Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,
Petitioner,
v.
THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA and THE UNITED STATES,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Petitioner Israel S. Weissbrodt

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York

MICHAEL D. LIEDER
Washington, D.C.

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QUESTION PRESENTED

Where the "results obtained" by an attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is "essentially nil" *per se* and is not to be considered in ruling on a fee application. App. at 13a.

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PETITION FOR A WRIT OF CERTIORARI

Israel S. Weissbrodt, by his undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.[1]

OPINIONS OF OTHER COURTS

The Court of Appeals entered judgment without an opinion affirming the judgment of the Court of Federal Claims (App. 1a). The opinion of the Court of Federal Claims (App. 2a-31a) is reported at 30 Fed. Cl. 8 (1993).

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[1] This petition is not filed on behalf of any corporation. *See* S. Ct. R. 29.1.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1994 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISION INVOLVED

This case does not turn on the provisions of any particular statute; it requires the articulation of a principle of law governing awards of attorney's fees in all cases in which the power to make such awards is vested in the federal courts and governed by federal law. In this case, that power was vested in the Court of Federal Claims, as successor to the Indian Claims Commission ("Commission"), under section 15 of the Indian Claims Commission Act, which provides, in relevant part,

> The fees of such attorney or attorneys [retained by a tribe, band, or other identifiable group of Indians] for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case.

Pub. L. No. 79-726, § 15, 60 Stat. 1049, 1053 (1946) (formerly codified at 25 U.S.C. § 70n (1976)).[2]

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[2] When the life of the Commission expired on September 30, 1978, the remaining cases on its docket were transferred to the United States Court of Claims. *See* Act of Oct. 8, 1976, Pub. L.

STATEMENT

Petitioner, Israel S. Weissbrodt ("Weissbrodt"), is a lawyer. Starting in 1949, he and other attorneys [3] represented Respondent The White Mountain Apache Tribe of Arizona (the "Tribe" or the "White Mountain Tribe") under a contingent-fee arrangement to pursue claims that the United States, as trustee for the Tribe, had mismanaged and misused the Tribe's funds and resources.[4] The case, in the nature of an accounting by a fiduciary, required an item-by-item evaluation of the government's management of tribal funds and resources, in large part as evidenced by a voluminous accounting first rendered by the Government to the Commission in this case in 1970 and extensively revised in 1975.[5] The evidence also included thousands of pages of documents, reaching back into the Nineteenth Century and spanning a period exceeding 75 years. *See* App. 34a.

In 1980, thirty years into the case, Weissbrodt negotiated a settlement on behalf of the Tribe with the De-

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No. 94-465, § 2, 90 Stat. 1990, 1991 (1976) (formerly codified at 25 U.S.C. § 70v (1976)). The United States Claims Court in turn obtained jurisdiction of such cases pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 129, 96 Stat. 25, 39 (codified prior to amendment at 28 U.S.C. § 1346(a) (1988)). Pursuant to the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516, that court is now called the United States Court of Federal Claims. *See Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2037 n.1 (1993).

[3] Petitioner has applied for fees on his own behalf and as a fiduciary for his colleagues at the time of the representation.

[4] App. 3a, 30 Fed. Cl. at 10; *see White Mountain Apache Tribe of Az.* v. *United States*, 11 Cl. Ct. 614 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 538 (1994); *White Mountain Apache Tribe of Az.* v. *United States*, 26 Cl. Ct. 446 (1992), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 538 (1994).

[5] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 26 Cl. Ct. at 454-55.

partment of Justice. The settlement was the product not only of years of litigation but also of presentations to the Department of Justice as to the value of the claims of the Tribe and of a second tribe, the San Carlos Apache, whose lands border those of the White Mountain Tribe, and whose claims had been litigated along with the White Mountain Tribe's.[6] The settlement called for the entry of a $13 million judgment in favor of the White Mountain Tribe and a $10 million judgment in favor of the San Carlos Tribe. App. 5a, 30 Fed. Cl. at 11. In recommending the settlement in 1980, the Weissbrodt firm predicted that "if the Government was required to furnish additional accounting reports, and additional trials were held, and the litigation was continued to final judgments, it might take up to about ten more years before the claims could be brought to final conclusions." Report on Proposed Settlement (1980), Ex. A to Third Affidavit of I.S. Weissbrodt, executed October 5, 1992 (excerpted in Court of Appeals Appendix at 187-88).

Although the San Carlos Tribe accepted the settlement for its claims, the White Mountain Tribe followed advice given by another lawyer—one William Veeder—to reject the settlement offer. According to the trial court, three concerns drove the rejection of the settlement. The first appears insubstantial: members of the Tribe worried that the proposed language of the judgment would preclude water rights and land recovery claims—the claims that Veeder was prosecuting in a separate matter (App. 6a-7a, 30 Fed. Cl. at 11-12). Although the United States' trial counsel assured the Tribe that he would recommend the inclusion of language clarifying that the judgment would be without prejudice to those claims, Veeder was apparently unconvinced. *See* App. 6a, 30 Fed. Cl. at

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[6] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 11 Cl. Ct. at 618, 621.

11.[7] The issue was never resolved, because Veeder succeeded in blocking all efforts to move forward to settlement. Second, Tribe members were dissatisfied with the amount of the proposed settlement (App. 7a, 30 Fed. Cl. at 12); here, too, Veeder left his mark, for he had offered the Tribe visions of a huge judgment, amounting to more than ten times the amount of the proposed settlement—and exceeding by a similar factor the actual $14.4 million judgment finally obtained after another decade of litigation.[8] Finally, "a principal reason" for

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[7] Letter from Richard L. Beal to Robert C. Brauchli (March 30, 1982), Ex. O-12 to Affidavit of Robert C. Brauchli executed September 14, 1992 (excerpted in Court of Appeals Appendix at 184); Letter from I.S. Weissbrodt to Robert Brauchli (Feb. 18, 1982), Ex. C-7 to Third Weissbrodt Affidavit, executed October 5, 1992 (excerpted in Court of Appeals Appendix at 194). Even apart from the assurance of the Government's trial counsel that the settlement agreement would be revised to make this matter plain, the concern was without foundation. The release clauses in the settlement agreement only covered claims which the tribes "have asserted or could have asserted" in the docket "under the Indian Claims Commission Act" (Court of Appeals Appendix at 79, 81). Neither the Commission nor its successors, the Court of Claims and the Claims Court (now the Court of Federal Claims), had any jurisdiction to entertain a claim for ownership of water rights or of land. Their jurisdiction was restricted to pecuniary claims. Thus, neither under the terms of the settlement nor under *res judicata* principles could these other claims have been foreclosed.

[8] *See* Affidavit of Michael D. Lieder, executed Aug. 4, 1992, ¶ 13 (excerpted in Court of Appeals Appendix at 72) ("Veeder appeared at our meeting with the Tribal Council . . . and contended that, apart from the possible adverse impact of the proposed settlement on the matters that he was handling for the Tribe, it was grossly inadequate in amount."); *see also* Response to Aug. 27, 1984, Order to Show Cause, filed Sept. 19, 1984 (excerpted in Court of Appeals Appendix at 233) ("Present counsel [Veeder] recommended rejection of the offer [renewed in 1984], stressing that the damage done to Plaintiff Tribe's Reservation, through intentional mismanagement, is far closer to $130,000,000 than to $13,000,000."); *White Mountain Apache Tribe of Az.* v. *United States*, 6 Cl. Ct. 575, 577 (1984) (quoting same), *vacated*, 776 F.2d 1073 (Fed. Cir. 1985).

rejecting the offer was the Tribe's desire to "know[] what its claims were worth" by litigating to the bitter end. App. 20a, 30 Fed. Cl. at 17-18.

After Veeder had suggested that the settlement be rejected, the Tribe sought to dismiss Weissbrodt as counsel for cause. This effort was rejected by the Department of Interior, which held that no such cause existed. Following this display of no-confidence, Weissbrodt agreed to a withdrawal by mutual consent, because he recognized "that it would be difficult for him and those associated with him on the contract to continue to represent the tribe under existing circumstances." [9]

Having succeeded in blocking a settlement, Veeder later took the helm on an hourly retainer, to be paid currently and not out of the award, and set about the task of litigating the case. His effort seemed to involve more than the usual consumption of judicial resources. By the end of 1984, he had disobeyed orders requiring the pretrial exchange of written experts' reports on the theory that the court lacked jurisdiction to make such orders; he had sought mandamus and moved for discretionary interlocutory review of those orders (unsuccessfully); he had moved for recusal of the trial judge (unsuccessfully); and he had been sanctioned with a daily monetary penalty of $100 for continued disobedience of the court's pretrial orders. Three published opinions plus other orders of the trial court, and two appeals to the court of appeals, were involved in this by-play.

Finally, faced with continued disobedience of its orders, the trial court sanctioned the Tribe by dismissing its complaint, citing (in a fourth published opinion) "a lack of diligence in pursuing [the] suit and willful refusal to com-

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[9] Letter from Kenneth L. Payton, Acting Deputy Assistant Secretary, Department of the Interior, to Ronnie Lupe, Chairman, White Mountain Apache Tribe (Aug. 24, 1981), Ex. A to First Lieder Affidavit, executed Aug. 4, 1992 (excerpted in Court of Appeals Appendix at 88); *see* App. 7a, 80 Fed. Cl. at 12.

ply with orders of the court." 6 Cl. Ct. at 578. In the interests of justice, however, the court also directed the entry of judgment in favor of the Tribe in the amount of $10 million, on the ground that this was the amount of the rejected settlement offer, less a $3 million pecuniary sanction. 6 Cl. Ct. at 585. By a two-to-one vote, the court of appeals vacated the dismissal of the complaint "to give the Tribe one final opportunity to comply with [the] court's pretrial orders." App. 33a; the dissenter took the view that the trial court had acted within its discretion in light of Veeder's misbehavior. App. 35a.

With the case reinstated, another decade of litigation followed. By the end, Veeder had amassed an impressive record, at least of litigation, if not of achievement: a grand total of two trials lasting several weeks each,[10] 13 published opinions by the trial court consuming a total of 223 pages in the official reporter,[11] and five trips to the court of appeals.[12] Through it all, Veeder litigated the

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[10] The resource mismanagement claims were tried in September and October 1986, following an inspection of the reservation by the trial judge involving travel around the reservation by automobile and helicopter as well as "a fixed-wing flight crisscrossing the entire reservation." 11 Cl. Ct. at 618, 621. A second trial began in December 1991 and after a respite concluded in March 1992, involving both accounting claims and "mixed resource mismanagement/accounting claims." 26 Cl. Ct. at 447-48.

[11] 4 Cl. Ct. 575 (1984); 4 Cl. Ct. 586 (1984); 5 Cl. Ct. 288 (1984); 6 Cl. Ct. 575 (1984); 8 Cl. Ct. 677 (1985); 9 Cl. Ct. 1 (1985); 9 Cl. Ct. 32 (1985); 9 Cl. Ct. 158 (1935); 10 Cl. Ct. 115 (1986); 11 Cl. Ct. 614 (1987); 20 Cl. Ct. 371 (1990); 25 Cl. Ct. 333 (1992); 26 Cl. Ct. 446 (1992).

[12] No. 94-5018 (Fed. Cir. Aug. 17, 1993) (unpublished, but noted at 5 F.3d 1506; text available on Westlaw, 1993 WL 309619); No. 91-5060 (Fed. Cir. June 3, 1991) (unpublished, but noted at 940 F.2d 676; text available on Westlaw, 1991 WL 138480); No. 88-1251 (Fed. Cir. May 10, 1988) (unpublished); Nos. 85-895 & 85-1348 (Fed. Cir. Aug. 7, 1985) (unpublished, but noted at 776 F.2d 1063; text reproduced at App. 32a-36a); No. 84-1434 (Fed. Cir. Aug. 1, 1984) (unpublished).

case to the hilt and rebuffed the trial judge's efforts to encourage the parties to settle the case—or even to settle tiny portions of it, such as one claim of less than $100. Examples of this behavior were detailed repeatedly by the trial court in its many published opinions in the case. *See, e.g.*, 9 Cl. Ct. 1 (1985) (criticizing plaintiff for filing "wholly noncompliant" papers); 9 Cl. Ct. 32, 35 (1985) (denying motion for rehearing, noting that plaintiff offered "no excuse for having failed" to bring supposedly important facts to the court's attention the first time around); 9 Cl. Ct. 158, 163 (1985) (questioning "wisdom of using judicial resources" by plaintiff to litigate an item worth less than $100); 10 Cl. Ct. 115, 117 (1986) ("This marks the third time in the recent past in which plaintiff has simply ignored evidentiary burdens with respect to damages."); 11 Cl. Ct. 614, 645 (1987) (criticizing plaintiff for coming to trial with two untenable measures of damages on water rights mismanagement claim, despite having been "forewarned"); 20 Cl. Ct. 371, 375-76 (1990) (rebuffing plaintiff for trying to relitigate previously rejected claims and for asserting new claim that came to counsel in an "epiphany" nearly thirty-five years after the statute of limitations had run); *id.* at 373 (urging negotiated settlement, but observing that "plaintiff's misapprehension of the type of claim that remains for resolution is entirely inconsistent with a realistic prospect of achieving some success by way of negotiation"); 26 Cl. Ct. at 483-84 (1992) (critizing "serious omission on plaintiff's part" in proving damages and finding that the disbursement process complained of by plaintiff was "inherently honest and reliable," but awarding damages "despite plaintiff's failure of proof," because critical evidence from the 19th and early-20th centuries had been lost).[13]

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[13] Unpublished decisions appear to have been to the same effect. *See, e.g.*, Order entered by the trial court on Feb. 8, 1991 ("No useful purpose was served by plaintiff's filing its most recent motion. The motion was denied previously for reasons fully explained in the orders of the court. Plaintiff is on notice that

In 1992, after the decade of litigation predicted by Weissbrodt, the Tribe obtained a judgment for $14.4 million—which by November 1993 had accrued approximately $4½ million in interest (App. 3a, 30 Fed. Cl. at 10). This total amount was worth less than 90% of the value in constant dollars of the settlement the Tribe rejected.[14] Weissbrodt applied for his fees, seeking 10% of the judgment, as contemplated by his contract with the Tribe. The amount of the fee, which was contingent upon recovery, was to be fixed by the court and was limited contractually and by the terms of the Indian Claims Commission Act to 10% of the recovery.[15] The trial court stayed Weissbrodt's fee application while Veeder unsuccessfully appealed the $14.4 million judgment, contending that the Tribe's claims were worth not just the $130 million he had presented to the Tribe at the time of re-

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future motions of this nature will not be tolerated. Should plaintiff file another frivolous, repetitive motion, plaintiff will be required to pay for defendant's attorney time in responding thereto. Although the court's consideration of such filings is gratis, plaintiff's opponent should not be required to respond without reimbursement of attorney's fees.") (quoted in an unpublished opinion of the court of appeals dismissing an appeal of the plaintiff (noted at 940 F.2d 676 (Fed. Cir. 1991), and available on Westlaw, 1991 WL 138480)).

[14] Using the 1967 = 100 base period, the unadjusted CPI-U for November 1993 was 436.9, and for January 1981 it was 260.5. *See* Bureau of Labor Statistics, *CPI Detailed Report*, November 1993, p. 8; Bureau of Labor Statistics, *CPI Detailed Report*, January 1981, p. 9. Multiplying the $13 million by the November 1993 CPI-U, and dividing by the January 1981 CPI-U, results in a current value for the rejected settlement, without interest, as of November 1993, of more than $21.8 million.

[15] The almost invariable practice of the Commission and its successors in making awards, and of the Department of the Interior in taking a position on them, was to award 10% in contingent-fee cases under the Act. App. 15a, 30 Fed. Cl. at 15. The Court of Claims made it clear in *Western Shoshone Identifiable Group* v. *United States*, 652 F.2d 41 (Ct. Cl. 1981), that the three principal factors to be considered in these cases were the "results obtained,"

jection of the settlement, but $1.5 billion.[16] These amounts were, respectively, approximately ten times and approximately 100 times the damages determined at trial. (Veeder also sought certiorari, which was denied. 114 S. Ct. 538 (1994).)

Following affirmance of the judgment, the trial court took up Weissbrodt's fee application.[17] In determining the amount of attorney's fees to award to Weissbrodt, the Court of Federal Claims—like the trial courts in innumerable other fee-application cases (see *infra* pp. 13-14, 17 & nn.22-24, 28-29)—was required by the governing statute to consider, among other things, the "results obtained." See App. 11a-14a, 30 Fed. Cl. at 14-15; Indian Claims Commission Act § 15 (quoted *supra* at p. 2). Weissbrodt sought a 10% fee, arguing that the "result" he had "obtained" was the $13 million settlement offer. This had been the product of a thirty-year litigation, and had been predicted by Weissbrodt to save the Tribe and the courts 10 years of additional litigation. That the settlement offer was *better* than the ultimate judgment—and that the case voraciously consumed judicial resources for another decade—served only to highlight its value.

However, the trial court concluded that it could not consider the settlement offer as a "result obtained," because its value once it was rejected was, *per se*, "essentially nil." App. 13a, 30 Fed. Cl. at 14. Accordingly,

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the fees awarded in other claims cases, and the risks involved for the plaintiff's counsel. On appeal, Weissbrodt sought only 10% of the $13 million.

[16] Affidavit of Michael D. Lieder, executed Jan. 6, 1994 (Court of Appeals Appendix at 247-48).

[17] On behalf of the Tribe, Veeder vigorously opposed the application; the Justice Department took no position, and the Department of Interior took no position on the amount of fees to be awarded, but stated that it had no objection to the allowance of expenses. Defendant's Response to Motion of I.S. Weissbrodt for Attorney Fees and Expenses (Oct. 5, 1993) (excerpted in Court of Appeals Appendix at 234-35).

the court evaluated the fee application as though the settlement offer had never been obtained by Weissbrodt. App. 13a-14a, 30 Fed. Cl. at 14-15. It concluded that Weissbrodt and his colleagues were entitled only to $200,000, as compensation for their thirty-two year representation of the Tribe, on the ground that "no sum exists that actually inured to the benefit of the Tribe" as a result of Weissbrodt's work. App. 23a, 30 Fed. Cl. at 19. A different evaluation necessarily will ensue on remand if the trial court is required to consider the settlement offer a "result obtained" by Weissbrodt.[18]

In reaching its decision, the trial court did not acknowledge the cases from state and federal courts addressing the same issue without applying any *per se* rule that a

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[18] In that context, the statute vests authority in the trial court to determine the proper fee, once it has been apprised of the proper legal standard. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983) (remanding because trial court "did not properly consider the relationship between the extent of success and the amount of the fee award"). In this regard, we are not seeking certiorari to review other obvious errors committed by the trial court and uncorrected by the court of appeals, such as, after ruling a nil value for the settlement, its choice of a "flat fee of $200,000.00" (App. 28a, 30 Fed. Cl. at 21), which was then rationalized by working backward. In this regard, the trial court refused to accept a 50/50 allocation between the two tribes for work that benefited both (primarily during the many years when the cases were consolidated for all purposes), even though the settlement proposed for the White Mountain Tribe was *higher* than the one accepted by the San Carlos Tribe; instead, the court "discounted" the allocation, so that nearly 60% of the work was said to have been done for the San Carlos Tribe's benefit, and only 40% for that of the White Mountain Tribe (App. 27a, 30 Fed. Cl. at 21). Similarly, the court imposed a 15% penalty for failure to keep time records during the 1970s (in a contingency-fee litigation) that comported with recordkeeping standards developed in the 1980s (App. 27a, 30 Fed. Cl. at 21). And, in another ruling favoring rejection, rather than acceptance, of settlements, the court held that the hourly fee to be paid in the 1990s would be based on the prevailing hourly rates of two or three decades ago (App. 29a, 30 Fed. Cl. at 22).

rejected settlement must be ignored (see *infra* p. 17 & nn.28-29); nor did it cite any case embracing the *per se* rule. Instead, the court erroneously considered the case to be one of "first impression" (App. 10a, 30 Fed. Cl. at 13), overlooking or ignoring the many decisions of the federal and state courts in which attorneys' accomplishments in negotiating settlements for their clients that the client elected to reject were considered as valuable "results obtained" in the judicial determination of attorneys' fees. The Court of Appeals for the Federal Circuit affirmed without opinion. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS AN OPPORTUNITY TO FASHION A RULE THAT PROMOTES SETTLEMENT IN A WIDE VARIETY OF CASES, MANY OF THEM COMPLEX

This Court has repeatedly extolled the virtues of rules favoring the settlement of litigation.[19] We suggest that promulgating rules that encourage the settlement of civil actions, especially actions that tend toward complexity, serves important purposes in the fair and efficient administration of justice by the federal courts. The need for such rules continues to increase as the number of federal cases filed and the caseload per judge continues to rise.[20] In a case set for argument this Term, the Solicitor General for the United States as *amicus curiae* recently reiterated his agreement that fair rules that encourage the settlement of civil litigation promote "important public interests" and "economic efficiency." Brief

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[19] *E.g.*, *Evans* v. *Jeff D.*, 475 U.S. 717, 732-34 (1986); *Mareck* v. *Chesny*, 473 U.S. 1, 7-10 (1985); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

[20] 1992 Report of the Director of the Administrative Office of the United States Courts 60-65 (district courts seeing renewed increases in civil workload after decline in late 1980s and steady increase in criminal workload); *id.* at 56-57 (steady rises for courts of appeals).

for the United States as *Amicus Curiae* in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, No. 93-714, at 18 (O.T. 1993, filed May 12, 1994).

This case provides an important opportunity to affirm such a rule. By concluding that a settlement offer is of "no value" if it has been rejected by the client, the lower courts applied a *per se* rule that shifted a major element of the economic cost of rejecting a reasonable settlement away from the litigant rejecting it and onto the counsel who recommended the settlement. This *per se* rule actually provides an economic disincentive toward settlement. By rejecting the settlement and hiring new counsel, the litigant effectively received thirty years' worth of legal services for close to no fee. Such a windfall would appear unfair in any event. But the lower courts' rule has the added disadvantage of relieving the client from one of the economic consequences of rejecting the settlement—having to pay a percentage of the rejected settlement, to the extent that the final award is equal to or greater than it. It also discourages settlement by strengthening the hands of lawyers who might "volunteer" to obtain a better result, by wiping the slate clean of any obligation by the client to pay a contracted-for percentage fee, or a fee measured by, or even reflecting the value of, the rejected settlement, to the first lawyer.

Whether a settlement offer is a valuable "result obtained" is an issue of broad importance. Of course, it is an issue present even in contingency-fee cases not involving a federal statute and in those involving only a single plaintiff. In this context, a number of federal courts have held that contingency-fee agreements are always subject to court supervision.[21] But the issue is much broader. In

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[21] *Venegas* v. *Skaggs*, 867 F.2d 527, 532 n.6 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990); *Cooper* v. *Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983); *Hoffert* v. *General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *Allen* v. *United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Dunn* v. *H.K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979).

a wide variety of cases, the federal courts are called upon to evaluate such "results" in passing on applications for attorneys' fees, whether there is a contingent-fee arrangement or not. These cases are apt to be complex, involving multiple plaintiffs or classes or groups such as the Tribe. Litigation of that sort consumes massive amounts of judicial resources. These cases include, among others, class actions in federal court,[22] cases under the fee-shifting provisions of the civil rights laws and the Equal Access to Justice Act,[23] and a myriad of other kinds of cases in federal court in which attorneys' fees are subject to the courts' supervision.[24]

In many ways, this case provides a paradigm of the type of case most likely to suffer from the *per se* rule applied by the lower courts and most likely to benefit from the rule that we suggest. This was a complex litigation in which the plaintiff was, in essence, a group of people that were numerous enough to have a multimillion dollar claim for the aggregate wrongs done to them and their predecessors, but geographically compact enough, and with enough organizational structure, to be suscept-

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[22] Under Rule 23(e) of the Federal Rules of Civil Procedure, courts consider and approve not only settlements, but also attendant fee applications. *See, e.g., Evans* v. *Jeff D.*, 475 U.S. 717, 724 (1986); *Rawlings* v. *Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993); *Ojeda* v. *Hackney*, 452 F.2d 947, 948 (5th Cir. 1972).

[23] *See, e.g., Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983); *Commisioner* v. *Jean*, 496 U.S. 154, 160-61 (1990).

[24] *See Gilson* v. *Chock Full O'Nuts Corp.*, 331 F.2d 107, 109 (2d Cir. 1964) (en banc, per Friendly, J.) (value of settlement in attorney's fee application in securities case governed by federal law, because "remedial incidents" of federal rights of action, including attorney's fees, are matters of federal law); *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1300 (5th Cir.) (same, in bankruptcy cases), *cert. denied*, 431 U.S. 904 (1977); *In re Complaint of Cap'n Rick Corp.* (*Viventi* v. *Cap'n Rick Corp.*), 525 F. Supp. 31, 35-36 (S.D.N.Y. 1981) (same, in admiralty case), *aff'd*, 685 F.2d 423, 426 & 428 (2d Cir. 1982).

ible to internal conflict.[25] The group also was compact enough that each member had a palpable stake in the size of the recovery, in contrast to huge nationwide class actions in which each class member's financial stake may be very small. It is these cases, in which a relatively compact—but still potentially fractious—group stands to share in a large recovery, that are often the most consuming of judicial resources. A review, for example, of the ten longest civil trials (all the ones consuming more than 60 trial days) during the year ended September 30, 1992 (the latest year for which such figures are available), reveals that six of the ten involved similarly compact groups.[26]

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[25] The group dynamics that can determine whether a settlement is accepted or rejected in a case like this one are the same whether the group is viewed juridicially as a single entity (like the Tribe or a labor organization), whether a large number of individual plaintiffs are involved, or whether a class action involving a relatively compact class is presented. In the latter two situations, a settlement may be impossible if substantial numbers of individual group members refuse to settle, or, in the case of a class, exercise rights to opt out under F.R.C.P. 23(c)(2).

[26] 1992 Annual Report of the Director of the Administrative Office of the United States Courts, Table C-9, at 220. *See In re San Juan Dupont Plaza Hotel Fire*, No. MDL 721, Amended Case Order, n.1 (D.P.R. Dec. 2, 1989) (2300 personal injury plaintiffs) (available on Westlaw, 1989 WL 168401); *In re Air Crash at Detroit Metropolitan Airport (McDonnell Douglas)*, 791 F. Supp. 1204, 1209 (E.D. Mich. 1992) (approximately 150 consolidated cases); *In re Joint Eastern & Southern Districts of New York Asbestos Litig.*, 827 F. Supp. 1014, 1023 (E. & S.D.N.Y. 1993) (sixteen personal injury plaintiffs); *City of Long Beach* v. *Standard Oil Co.*, 872 F.2d 1401, 1402 (9th Cir. 1989) (city and state for itself and its political subdivisions), *cert. denied*, 493 U.S. 1076 (1990); *Al-Jundi* v. *Rockefeller*, 885 F.2d 1060, 1062 (2d Cir. 1989) (prisoners at Attica state prison during 1971 riot); *Werlein* v. *United States*, 746 F. Supp. 887, 890 (D. Minn. 1990) (residents of area surrounding munitions plant that discharged toxic waste), *vacated pursuant to settlement*, 793 F. Supp. 898 (D. Minn. 1992).

The litigants in these cases are those often most susceptible to the "volunteer" "spoiler" counsel, who attack a proposed settlement with the promise of a huge recovery and hints of a sell-out by the original counsel who is recommending settlement. A common result, as here, of the rejection of such a settlement sponsored by initial counsel, particularly where volunteer counsel have advised against the settlement, is the discharge or withdrawal by mutual consent of the lawyer whose recommendation has been rejected. With groups of this sort, there are apt to be some internal differences of opinion, or some members of the group may have access to potential "volunteer" substitute counsel, or such volunteers have access to them, creating a likelihood of second-guessing of a proposed settlement by dissidents. Thus, it is these cases that would benefit most from a rule providing for the award of compensation to the original counsel as if the initially negotiated settlement had been accepted, for such a rule would provide a real economic incentive for accepting reasonable settlements.[27]

We do not suggest, of course, that every settlement that is negotiated by counsel ought to be accepted by the client. The client has, and must have, the right to choose. But just as the client must have the right to accept or

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[27] It is irrelevant to say, as did the trial court (App. 20a, 30 Fed. Cl. at 18), that if the ensuing litigation had resulted in a judgment that the Tribe take nothing, Weissbrodt would have been entitled to nothing, and accordingly the rejected settlement was of no value. It is true that in such a case Weissbrodt would have gotten nothing—10% (or any percent) of nothing is nothing. The result ultimately obtained is the outside limit, to be sure. But it turned out that a "take nothing" judgment was not the result. A judgment in approximately the same dollar amount but, of course, in depreciated dollars, was obtained a decade later. Indeed, it was not surprising that an amount of a similar order of magnitude to the settlement was eventually obtained, in a case involving a vast panoply of individual claims based on a large part of a century of stewardship of the United States over the Tribe's affairs—a case in the nature of an "accounting."

reject a settlement, the exercise of that right should be conditioned on facing certain obligations; and the nature of those obligations must be defined by common fairness, a due regard for the proper administration of justice, and a concern for the proper allocation of increasingly scarce judicial resources. Just as the client must be master of the decision whether to settle or not, the client must be responsible for the decision not to settle a case as recommended by counsel, and for the fair consequences of that decision.

II. THE *PER SE* RULE APPLIED BELOW IS CONTRARY TO THE AUTHORITIES

The holding below that a settlement offer once rejected is not a valuable "result obtained" by counsel conflicts with the holdings of a variety of state and federal courts. Some courts have held that a client who rejects a settlement and hires substitute counsel must be held to the letter of the bargain with the first contingent-fee counsel upon recovery.[28] Others have held that such counsel are entitled to a *quantum meruit* recovery, in which the amount of the rejected settlement is to be taken into account in assessing the value of the services provided.[29] But, so far as we can tell, no court has, until now,

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[28] *E.g.*, *Spahn* v. *United States*, 92 F. Supp. 992, 994 (E.D. Va. 1950); *Doucet* v. *Standard Supply & Hardware Co.*, 250 So. 2d 549, 550-51 (La. Ct. App. 1971); *Osius* v. *Hastings*, 97 So. 2d 623, 625-26 (Fla. Ct. App. 1957), *vacated for lack of jurisdiction*, 104 So. 2d 21 (Fla. 1958); *Dolph* v. *Speckart*, 186 P. 32, 33, 36 (Or. 1920). *Cf. McGowan* v. *Parish*, 237 U.S. 285, 299-300 (1915) (holding contingent-fee client to letter of agreement upon recovery after discharge of counsel).

[29] *E.g.*, *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 596-97 (10th Cir. 1990), *modified on other grounds*, 932 F.2d 898 (1991) (en banc); *In re Complaint of Cap'n Rick Corp.*, *supra*, at 35-36; *Blunt* v. *Northern Oneida County Landfill*, 536 N.Y.S.2d 295, 297 (N.Y. Ct. App. 1988); *Johnson* v. *Long*, 305 N.E.2d 30, 31-32 (Ill. Ct. App. 1973).

adopted a *per se* rule *excluding* the rejected settlement from consideration.

A rule treating a settlement offer—even one that was rejected—as a "result" of some value makes perfect sense as a matter of policy. It encourages settlements by providing economic incentives toward settlement. It promotes participation by counsel in cases where fees are subject to court approval, for it provides counsel an objective basis for believing that they will be compensated fairly upon negotiation of a reasonable resolution. Indeed, without such assurances, counsel are likely to be less inclined to take such cases, even if meritorious. And —perhaps most important—it recognizes that clients, the interests of justice and the administration of the judicial system are often better served by counsel who encourage them to resolve their differences fairly, rather than egg them on to "push the envelope" and test every legal and factual issue to the end. As Judge Will once said, "One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement." Hubert L. Will, *et al.*, "The Role of the Judge in the Settlement Process," *Seminar for Newly Appointed District Judges*, 75 F.R.D. 89, 203 (1976).

III. THIS CASE IS AN IDEAL VEHICLE FOR ANNOUNCING AND APPLYING THE RULE

The facts of this case present a paradigm of what can go wrong where "spoiler" counsel persuades litigants in a complex civil case to find out what their case is "really worth" by testing every legal and factual theory, no matter how unlikely to succeed, rather than resolve their case reasonably. By the time Veeder took over, the case had already gone on for thirty years, consuming substantial judicial and governmental resources.[30] Indeed, it

[30] *See Hearing on H. R. 11909 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular*

took two decades to get the Government to produce an accounting for its stewardship, and then another five years, until 1975, for it to revise that accounting to the point where it could begin to serve as a basis for a determination of the obligations owed to the Tribe.[31] The benefits of a settlement in 1980 would have been enormous. The Tribe would have received a far better recovery. Ten years of complex litigation, punctuated by frequent frivolous positions by the plaintiff, would have been pretermitted. Enormous costs to the Tribe, the Justice Department and the courts would have been avoided. It is fair to say that the only person who actually benefited from the rejection of the settlement and concommitant litigation to the bitter end was the new counsel.

This case provides the Court with an opportunity to address this subject, an important one in cases that are by their nature going to be complex, and to reject a rule that provides a disincentive to settlement by removing one of the economic consequences of rejecting a settlement. It provides the Court an opportunity, following the minimum requirement of other courts that have addressed the issue, to enunciate a proper rule: that the rejected settlement must be viewed as a "result obtained"; and that in appropriate cases a percentage fee based on the settlement must be awarded to counsel presenting a settlement, which is then rejected, to the extent that ultimately there is a recovery. Such a rule would avoid disincentives for parties to agree to settlements, appropriately encourage settlements, be fair in its application, and accord with the mainstream of judicial authority.

Affairs, 94th Cong., 2d Sess. 52 (1976) (testimony of Jerome K. Kuykendall, Chairman of the Indian Claims Commission) (describing one phase of the case, in which Weissbrodt had filed 1,500 pages of exceptions to the Government's accounting, and 73 motions for partial summary judgment).

[31] *White Mountain Apache Tribe of Az.* v. *United States*, *supra*, 26 Cl. Ct. at 452-55.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Petitioner
Israel S. Weissbrodt

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York

MICHAEL D. LIEDER
Washington, D.C.

August 1994

APPENDIX A

[Filed Jul. 12, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5036

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellee,

v.

ISRAEL S. WEISSBRODT,
Movant-Appellant.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims in CASE NO(S). 22-H

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (MICHEL, LOURIE and SCHALL, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Jul. 12, 1994

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 22-H

(Filed November 4, 1993)

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Indian claims; claim for attorneys' fees and expenses under the Indian Claims Commission Act.

William H. Veeder, Washington, D.C., for plaintiff.

Michael D. Lieder, Washington, D.C., for I.S. Weissbrodt.

James M. Upton, Washington, D.C., with whom was *Acting Assistant Attorney General Lois J. Schiffer,* for defendant.

OPINION

NETTESHEIM, Judge.

This matter is before the court after argument on Israel S. Weissbrodt's motion filed August 19, 1992, on behalf of the now dissolved firm of Weissbrodt & Weissbrodt

(referred to collectively as the "associated attorneys"), for reimbursement of attorneys' fees and expenses. Mr. Weissbrodt, former attorney of record for the White Mountain Apache Tribe ("the Tribe"), moves pursuant to General Order No. 4, Dec. 20, 1982 (Indian Claims Commission Act of August 13, 1946, 60 Stat. 1053 § 15, *as amended*, 25 U.S.C. § 70n (1976) (omitted from Code pursuant to Commission termination on Sept. 30, 1978)), for an order awarding him 10 percent of the $14,386,470.32 judgment in favor of the Tribe entered by this court on July 21, 1992, *White Mountain Apache Tribe v. United States*, 25 Cl. Ct. 333 (1992), *aff'd*, No. 93-5018, 1993 U.S. App. LEXIS 20,903 (Fed. Cir. Aug. 17, 1993) (unpubl.), *reh'g denied* (Fed. Cir. Sept. 13, 1993), plus interest, which now totals approximately $19 million.[1] Mr. Weissbrodt also moves for reimbursement of previously unreimbursed expenses totalling $75,205.44 incurred in connection with the prosecution of the Tribe's claims.

FACTS

Mr. Weissbrodt began his association with the Tribe on July 15, 1949, under a contract with the Tribe's counsel. Commencing in 1953 Mr. Weissbrodt worked directly with the Tribe under 10-year contracts approved by the Department of the Interior, up to the point of his withdrawal as attorney of record for the Tribe's claims on February 23, 1982. The last contract under which Mr. Weissbrodt worked for the Tribe contained a clause basing compensation on a contingent fee of up to 10 percent of any amount recovered for the Tribe. The full text of the clause reads:

> 8. It is agreed that the compensation of the ATTORNEYS for the services previously rendered and to be rendered under the terms of this CON-

[1] The motion was fully briefed in 1992; the court stayed its decision until the Federal Circuit resolved the Tribe's appeal of the judgment. *See* Order entered on Oct. 30, 1992, ¶ 2.

> TRACT *is to be wholly contingent* upon a recovery for the TRIBE. The ATTORNEYS shall receive such compensation as the court or tribunal awarding a recovery to or for the TRIBE shall determine to be equitably due the ATTORNEYS, or, if the matter be settled without submission to a court or tribunal resulting in a recovery to or for the TRIBE, as the Secretary of the Interior or his authorized representative may find to be equitably due the ATTORNEYS, but in no event shall the aggregate fees exceed ten percentum of any and all sums recovered or procured, through efforts, in whole or in part, for the TRIBE, whether by suit, action of any department of the Government or of the Congress of the United States, or otherwise.

Attorney Contract between the White Mountain Apache Tribe and I.S. Weissbrodt, *et al.*, June 17, 1966, ¶ 8 (emphasis in original).

Ten percent was the maximum allowed under section 15 of the Indian Claims Commission Act, 60 Stat. 1053, § 15 (formerly codified at 25 U.S.C. § 70n), which provides:

> The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. . . .

In October 1950, as amended on October 27, 1959, the Tribe and the San Carlos Apache Tribe of Arizona ("the San Carlos Tribe") filed a petition with the Indian Claims Commission seeking to recover for mismanagement of tribal resources and funds and for aboriginal land claims. In 1959 the aboriginal land claims were severed from the resource management and accounting claims. The land claims were eventually settled for $4,900,000.00 on September 12, 1972. Litigation continued on the remaining claims under Docket No. 22-H, which were transferred to the Court of Claims on December 15, 1976. It appears that little activity occurred during this time aside from the issuance of an accounting report by the Government in 1970 and the court-ordered revision of the same in 1975. In April 1978 the Trial Division of the Court of Claims conducted a 6-day trial on the propriety of the Government's disbursements from the Indian Moneys, Proceeds of Labor accounts through August 1946. After the trial counsel for defendant was directed to prepare a set of proposed findings of fact. During this period settlement talks ensued.

The present controversy involves an attempt to settle the claims in Docket No. 22-H and the Tribe's subsequent discharge of Mr. Weissbrodt. The settlement discussions begun by the parties in March 1980 eventually led to a proposed agreement under which the Tribe would be paid $13 million for its claims and the San Carlos Tribe $10 million.[2] The San Carlos Tribe approved the settlement, and judgment was entered in favor of the San

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[2] At the time the settlement was presented to the Tribe for approval, it was far from a done deal. The acceptance letter dated October 28, 1980, sent by then-Assistant Attorney General James W. Moorman was subject to a number of conditions including: approval of the settlement by the governing bodies of the plaintiff tribes and the Court of Claims; approval of the settlement and the tribal resolutions by the Secretary of the Interior; and waiver of all claims that had been or could be brought by the Tribe under Docket No. 22-H.

Carlos Tribe pursuant to the settlement on January 19, 1981.

The Tribe was more hesitant about the settlement than the San Carlos Tribe. Of particular concern was the language contained in ¶ 6 of the Department of Justice's version of the settlement, which set as a condition of the settlement:

> 6. That the judgments entered into pursuant to this settlement shall finally dispose of all rights, claims, and demands which the plaintiffs have asserted or could have asserted against the defendant under the provisions of the Indian Claims Commission Act in Docket No. 22-H before the Court of Claims.

On October 10, 1980, tribal attorney Kathleen A. Rihr requested clarification from the Weissbrodt firm and from attorney William H. Veeder, the Tribe's Water Rights Attorney, of whether the settlement precluded the water rights and land recovery claims that the Tribe had been pursuing through Mr. Veeder.[3] At the Tribal Council meeting called to discuss the settlement negotiated by the Weissbrodt firm, several concerns were raised. Members of the Tribal Council were confused about how the Weissbrodt firm had arrived at the figure of $13 million as the settlement amount. Tribal Council Chairman Ronnie Lupe raised the concern that ¶ 6 of the settlement offer would require the Tribe to waive its rights to other claims, including water rights and land recovery claims.

These concerns, coupled with concerns about the amount of offset claims the Government may have asserted against the Tribe and the scope and basis of the

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[3] Mr. Veeder eventually became counsel of record in November 1983, replacing interim counsel of record Robert C. Brauchli, who has served as General Counsel to the Tribe from 1980 through 1987; as Special Counsel from August 1987 through May 1988; and General Counsel from May 1990 to date.

settlement, caused growing discontent within the Tribe regarding the associated attorneys' handling of the Tribe's claims. By Tribal Resolution adopted on February 10, 1981, the settlement was eventually rejected on the basis that it would compromise the Tribe's other claims and that the $13 million figure was inadequate compensation for damage due to mismanagement. After this event relations between the Tribe and the associated attorneys worsened until the Tribe terminated the contract with the associated attorneys by Tribal Resolution adopted on April 1, 1981. Although the Department of Interior failed to approve the Tribe's termination of the contract for cause, the associated attorneys agreed to terminate the contract by mutual consent. On February 23, 1982, the Court of Claims granted Mr. Weissbrodt leave to withdraw as attorney of record and substituted Mr. Brauchli as his successor. On November 7, 1983, Mr. Veeder became counsel of record and pursued the litigation through two trials in the United States Claims Court up to July 21, 1992, when judgment was entered in favor of the Tribe. Throughout this period, Mr. Veeder provided his services at an hourly rate of $80.00. At present Mr. Veeder continues as the Tribe's counsel of record.

Pursuant to an order entered on April 28, 1983, Mr. Weissbrodt filed a memorandum on May 27, 1983, informing this court of his intention to claim attorneys' fees out of any possible award to the Tribe. Following the Tribe's response to Mr. Weissbrodt's subsequent motion for attorneys' fees filed on August 19, 1992, and defendant's motion to stay proceedings on the motion pending appellate review of the judgment entered on the merits, this court issued an order on September 24, 1992, asking the parties to respond to the motion to stay. After briefing, an order entered on September 30, 1992, delaying resolution of the motion pending receipt of Mr. Weissbrodt's reply brief to the Tribe's response. *See supra* note 1. The order indicated that if a percentage-

based fee award was used, an accurate determination of the fee amount could not be made until after appellate review of the final award to the Tribe. A determination regarding the stay therefore was made contingent on a finding by the court of whether a percentage or a fixed-sum award was appropriate for the fee award.

On October 30, 1992, the court issued an order stating that "[a]fter extensive review of the applications for fees and expenses, the court concludes that a fixed amount should be awarded. . . ." The court also reconsidered its prior order and granted the stay pending appellate review because "a reasonable award cannot be made without knowing with certainty the amount of the ultimate award and the types of interest that will be allowed thereon. . . ." *Id.* The order further provided that a decision on the motion for fees and expenses would follow promptly after the Federal Circuit decision was rendered. The appeals court affirmed the final judgment on August 13, 1993. *White Mountain Apache Tribe v. United States,* No. 93-5018, 1993 U.S. App. LEXIS 20,903 (Fed. Cir. Aug. 17, 1993) (unpubl.), *reh'g denied* (Fed. Cir. Sept. 13, 1993).

The parties have been aware since September 30, 1992, that the court was considering an award of a fixed amount. Indeed, prior to that order, the associated attorneys had briefed their motion with information relating to approximately 5,000 hours actually worked. During argument on October 15, 1993, the court discussed with the parties an award based on an hourly rate for the attorney hours expended as a measure of the reasonableness of the award. Mr. Weissbrodt filed a motion on October 25, 1993, for leave to supplement the record to include additional evidence concerning the number of hours expended, the nature of work performed, and a reasonable hourly rate. This motion was granted. In response plaintiff filed a motion to preclude reliance upon affidavits to supplement the record or, alternatively, to provide the Tribe with

records supporting the total hours claimed, as well as the hours that were the subject of the associated attorneys' original motion. The affidavits in question support the associated attorneys' claim that a $200-250.00 per hour fee is reasonable for the associated attorneys' work by present-day standards, and two affidavits purport to justify some 9,000 hours. Because resolution of the associated attorneys' motion does not require use of present-date fee rates, *see* discussion *infra* at 20-21 [27a-29a herein], it is unnecessary to preclude reliance on these affidavits. Insofar as the affidavits address hours worked, the associated attorneys have no excuse for attempting to submit evidence to augment the number of hours at this late date. The Tribe's motion was therefore denied.

DISCUSSION

Mr. Weissbrodt styled his motion for attorneys' fees and expenses as a motion for summary judgment. A fee application is not meant to be a time-consuming trial-type proceeding. *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). Rather, it is a summary proceeding by which the court determines a fee that is reasonable for the work performed. Mr. Weissbrodt, however, is misguided in relying on summary judgment standards to support his motion since the standards of RCFC 56 are inapplicable to fee applications. Most fee applications are challenged, with disputed facts resolved based on the record. Although the number and disputatiousness of factual thrusts and parries in the matter may be of singular record, the record provides sufficient material and relevant information to determine the amount of an appropriate award.

I. *Attorneys' fees*

There is a notable paucity of case law regarding the award of attorneys' fees in situations such as the one at hand. Few Indian claims have been brought in the last 25 years, and those that have did not involve significant disputes regarding attorneys' fees. In prior cases wherein

attorneys' fees were at issue, the fee awarded has consistently been at or near the statutory maximum of 10 percent of the final award. *See Western Shoshone Identifiable Group v. United States,* 228 Ct. Cl. 26, 39, 652 F.2d 41, 49 (1981). The present case is unique, however, because it involves a motion for fees made by attorneys who were not involved in the litigation resulting in the final award and whose last contract with the plaintiff Tribe ended 10 years before the final award was made. As such, this matter is essentially one of first impression.

A. *Factors considered in determining the reasonableness of award*

In *Western Shoshone* the Court of Claims adopted the factors considered in *Cherokee Nation v. United States,* 174 Ct. Cl. 131, 355 F.2d 945 (1966), for determining the reasonableness of an attorneys' fee award:

1) The nature of the undertaking and the character of the services required

2) The responsibility assumed

3) The professional repute, standing, ability, and experience of counsel

4) The services rendered, including the time and labor required

5) The magnitude and importance of the cases

6) The novelty and difficulty of the questions involved

7) The opposition encountered

8) The results accomplished and the benefits flowing to the clients

9) The professional competence displayed, including skill, industry, and diligence

10) The fidelity of counsel to the interests of their clients.

11) The contingent nature of the employment and the hazards and risks involved

12) The loss of income and opportunities for other employment due to employment of counsel in the litigation for which compensation is to be awarded

13) Customary charges and going rates of attorneys for similar services

228 Ct. Cl. at 37, 652 F.2d at 49 (citing *Cherokee Nation*, 174 Ct. Cl. at 146-47, 355 F.2d at 953-54). The associated attorneys have cited the *Western Shoshone* criteria as the appropriate test for the reasonableness of their fee request. In justifying the 10-percent award requested, the associated attorneys rely presumptively on the results that they obtained for the Tribe, *i.e.*, the proposed settlement; the well-established custom of awarding attorneys 10 percent of the final award; the risks involved in the litigation; and their loyalty to the Tribe. Taken together these factors do justify compensating the associated attorneys for their services, but not to the extent of the full 10 percent of the final award.

1. *The results obtained*

The associated attorneys argue that the $13 million proposed settlement negotiated by them in October 1980 "provides the measure of the associated attorneys' results." Assoc. Attys' Br. filed Aug. 19, 1992, at 11. The associated attorneys compare the settlement amount with the $14.386.545.32 award eventually obtained in 1992 and claim that even with conservative investment, the present value of the 1982 settlement would far exceed the 1992 value of the litigated award. This argument rests on the invalid assumption that the two are comparable since the settlement proceeds would not have been held for 10 years.

With hindsight, litigation decisions often take on a different light. But it is quite unreasonable to condemn a decision once the factfinder is gifted with the knowledge the passage of time allows. In 1982 the Tribe could not have known what the result of pursuing the litigation would be. Based on its own wishes and the advice of counsel, the Tribe made the decision to reject the settlement and litigate the claims. The decision to accept or reject a settlement offer rests solely with the client, not with the attorney who negotiates it. *United States v. Int'l Bhd. of Teamsters,* 986 F.2d 15, 19 (2d Cir. 1993) (citing *United States v. Beebe,* 180 U.S. 343, 350-53 (1901)).

The record demonstrates that the Tribal Council carefully considered the settlement, but could not reconcile the questions that it had regarding waiver of the water and land claims and the basis for the $13 million settlement figure. Several requests were made to the associated attorneys to address these concerns, but the Tribe eventually concluded that these concerns warranted rejecting the certainty of the settlement. This court cannot presume the decision of the Tribe to reject the settlement offer was unreasonable, especially since the Tribe eventually recovered a substantial sum. Although the associated attorneys have made allegations that the Tribe was unduly influenced by Mr. Veeder, they have introduced no evidence to indicate that the Tribe's decision was irrational or the product of undue influence. Evidence to the contrary abounds. Absent significant evidence of fraud or mutual mistake, this court is unwilling and unable to question the validity of the Tribe's decision. *Cf. Cheyenne-Arapaho Tribes of Indians v. United States,* 229 Ct. Cl. 434, 442-43, 671 F.2d 1305, 1311 (1982) (citing *Callen v. Pennsylvania R.R. Co.,* 332 U.S. 625, 630 (1948)) (settlement can only be challenged by showing that it "is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted").

The result obtained by the associated attorneys was a settlement that was not acceptable to the Tribe. A rejected settlement, no matter how attractive it appears with hindsight, cannot reasonably be termed a "result accomplished" that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys for the Tribe was essentially nil. The true "result accomplished and the benefit[] flowing to the client[]" was the final award. The associated attorneys are entitled to compensation only to the extent that their efforts contributed to achieving this award.

The work performed by the associated attorneys in pursuing the Tribe's claim in the initial stages was beneficial to the Tribe. By pursuing the claims before the Indian Claims Commission, the associated attorneys began the process that eventually resulted in a favorable award to the Tribe. The court does not question the assertion that the services performed provided some benefit to the Tribe. Rather, the record belies the associated attorneys' assertion that the value of these services should be measured using either the proposed settlement or the final award as lodestars.

Based on the record and the court's first-hand knowledge of the trials, it is clear that the research performed by the associated attorneys was not used in obtaining the final judgment. The research undertaken for the settlement was never turned over to the Tribe. *See* Affidavit of Robert C. Brauchli dated Sept. 14, 1992, ¶¶ 38-39, 59. Although Mr. Weissbrodt claims that his firm amassed over 100 cubic feet of documents in preparation for litigation, the witnesses in the resource and accounting phases of litigation relied on the products of their own research.

The associated attorneys contend that their work was instrumental in obtaining the 1975 GSA Indian Trust Accounting Division, Office of Finance Disbursement Account Report that formed the basis of the 6-day 1978

trial on certain fiscal claims and that they filed numerous exceptions to the 1975 GSA Report. The court understands that this 1978 trial involved the Government's proof to substantiate the reasonableness of its accounting. The court acknowledges this work in its calculation of the award due on the motion for fees. However, the 3-week 1991-1992 trial on all accounting issues was *de novo* (*see* order entered on July 31, 1990); expanded in scope; and did not utilize anything from the prior effort, other than the 1975 GSA Report which, itself was supplemented in the long period during which the Tribe's fiscal claims were developed and litigated before this court. *See White Mountain Apache Tribe v. United States,* 4 Cl. Ct. 586 (1984) (interim order on fiscal claims). Paul J. Gillis, the Tribe's expert on fiscal claims, prepared the exceptions to the 1975 GSA Report that were the basis for trial in 1991-1992. In addition, since the earlier trial was limited to determining the sufficiency of the Government's accounting, the vast majority of the evidence was submitted by defendant, not the Tribe. Under these circumstances the court is justified in substantially limiting the award due the associated attorneys. *See Red Lake and Pembina Bands v. Turtle Mountain Band of Chippewa Indians,* 173 Ct. Cl. 928 937-38, 355 F.2d 936, 938 (1965) (finding that although claimant attorneys did "perform certain legal services in connection with the Commission's final award," this work did not contribute to the attainment of the final award and did not justify an award of attorneys' fees).

2. *The customary fee charged by Indian claims attorneys*

The contract under which the associated attorneys performed their work provided for a contingent, not a fixed fee. There was never a guarantee that they would be paid. The attorney contract explicitly stated that payment to the associated attorneys was to be "*wholly contingent* upon a recovery for the TRIBE." Attorney Contract be-

tween the White Mountain Apache Tribe and I.S. Weissbrodt, *et al.*, June 17, 1966, at ¶ 8 (emphasis in original) ("Attorney Contract"). Because the contract was contingent, the associated attorneys were aware that there was a chance that they would receive nothing for their efforts.

The associated attorneys correctly state that the Court of Claims traditionally awarded the full 10-percent fee in Indian claims cases. In almost all the cases cited as support for this contention, however, the attorneys receiving the 10-percent fee were also the attorneys who pursued the litigation up to and through the final award.[4] A close

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[4] In *Western Shoshone*, 228 Ct. Cl. at 41, 652 F.2d at 50, the attorneys carried their clients' claim through 49 years of litigation, including resolution of unfavorable precedent, resisting offsetting claims, and valuation of land claims. The attorneys were discharged just four months before the Indian Claims Commission finally issued a $26,145,189.89 award. All the work leading up to the award except the final oral argument had been performed by the initial attorneys, however. In *Gila River Pima-Maricopa Indian Community v. United States*, 8 Cl. Ct. 569, 571 (1985), the attorneys brought their client's claim through two trials and three appeals using "extensive and novel efforts in discovery, organization and presentation." Even in the case involving the San Carlos Tribe settlement, the associated attorneys were the attorneys of record at the time a favorable award was obtained.

Uniformly, the 10-percent fee has been awarded only to the attorneys who actually brought the client's claim to final judgment. *See Sioux Nation of Indians v. United States*, 227 Ct. Cl. 404, 650 F.2d 244 (1981) (attorneys successfully lobbied Congress to pass law excluding offset claims against clients, overcame 2 prior adverse decisions and won the largest award in tribunal's history—$105,994,430.52); *Turtle Mountain Band of Chippewa Indians*, 225 Ct. Cl. 746, 748 (1980) (attorneys established title and boundaries to land, determined favorable time of taking, and prevailed on two appeals over 37 years of litigation); *Citizen Band of Pottawatomie Indians*, 221 Ct. Cl. 847, 848 (1979) (17-page docket showed "virtually an unbroken sequence of activity in this case since its original filing in 1950," including 2 appeals leading up to $4,497,815.59 final award); *Kickapoo Tribe of Kansas*, 220 Ct. Cl. 687 (1979) (case required 27 years, and numerous trials in-

examination of these cases shows that the Court of Claims intended the 10-percent fee as compensation for attorneys who succeeded in prosecuting a case to a final award for their clients. The 10-percent contingent fee was meant as payment for a "result achieved" for the client, not an automatic guaranteed payment for all work done. The associated attorneys have not cited, and this court is unaware of any cases, in which the full 10-percent fee was awarded to attorneys who did not participate in bringing the claim to final judgment.

The associated attorneys now ask this court to compel the Tribe to remit 10 percent of its judgment to attorneys who did not participate in the suit that eventually yielded the award, even though the Tribe has already paid the attorney that prosecuted the case. Not unreasonably, the associated attorneys point out that the congressionally mandated 10-percent award is less than customary contingent fee contracts. Congress presumably selected the 10-percent figure in recognition of both the magnitude of awards in Indian Claims Commission cases and the years of litigation effort necessary to achieve an award. Therefore, it can be argued that a 10-percent award is *ipso facto* reasonable since, being a departure from the norm and favoring the Indians, it represents Congress' assessment of the extent to which Indian claims attorneys should be compensated in the circumstances. Hence, the associated attorneys argue that Mr. Veeder has been compensated with an annual fee per his contract with the Tribe, but they have not.

The difficulty with this approach is that it would transmute the congressionally-approved maximum into a man-

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volving conflicting claims, to result in a $11,427,130.00 final judgment); *Creek Nation*, 220 Ct. Cl. 620 (1979) (attorney began researching tribe's claim in 1930, was involved in creation of Indian Claims Commission, and spent 27 years litigating claim). While the associated attorneys' efforts are worthy of compensation, they pale in comparison to the efforts that have previously warranted a 10-percent contingency fee.

dated award, whereas Congress specifically reserved to the court the determination of a reasonable fee. Regardless of the favorable nature of the proposed settlement that the associated attorneys negotiated years before, this court does not find 10 percent of the final award to be equitable compensation as envisioned by the contract. The associated attorneys are entitled to compensation, but not an amount equal to that traditionally awarded to attorneys who have played a much greater role in obtaining a final award.

3. *The risks involved*

The associated attorneys assert that there was a substantial risk of nonrecovery when they decided to take on the Tribe's case in 1950. Many issues pivotal to success on the merits were unresolved when the action was first started. Because the associated attorneys could not be confident of a fee commensurate with the hours devoted to the case, they argue that a 10-percent fee is appropriate.

Risk does have significance in fee analysis, but its significance is substantially diminished in the present case due to the lack of involvement of the associated attorneys in the litigation of the Tribe's claims. Once the associated attorneys decided not to pursue litigation, but instead negotiated a settlement, the risk to them was substantially reduced. Considering, in addition, the other factors surrounding this case, the risks involved take on a relatively minor importance in determining the associated attorneys' fees. The risk in settling the case was certainly much less than the risk of carrying the case to trial.

4. *Loyalty to the interests of the Tribe*

The discharge of the associated attorneys was marred with accusations of malpractice and incompetence made by both Mr. Weissbrodt's firm and Mr. Veeder. The allegations and attacks launched by each side have bor-

dered on the hysterical at points and have impaired, rather than facilitated, a reasoned resolution to this dispute.

Given the appreciable sum negotiated by the associated attorneys and the findings of the Secretary of the Interior regarding the Weissbrodt firm's performance as counsel, it is unnecessary to pursue the issue of malpractice and breach of loyalty any further. These allegations are insufficiently founded to have an effect on the amount due the associated attorneys. When this factor is viewed in light of other considerations, especially the degree to which the associated attorneys' work assisted in obtaining the final judgment, the other factors overshadow the poorly developed and openly bellicose accusations leveled by both sides.

5. *Other considerations*

The associated attorneys maintain that other factors, including the extensive scope of the Tribe's claims, the skill of the attorneys, the excellent result obtained in the proposed settlement, and the opposition encountered, support a 10-percent fee. To lend support to their claim, they have submitted documentation of the hours the firm devoted to the Tribe's claim and a summary of other awards obtained by their firm for other Indian clients.

In support of their motion, the associated attorneys submitted 56 pages summarizing the amount of time devoted to the Tribe's claim between 1969 and 1982. These submissions, however, cause concern due to the lack of specificity regarding the nature of the work and the client for whom the work was done. The sheets submitted contain only the number of hours worked and do not provide any sort of description of the work performed. The court has no basis for determining whether the amounts claimed are properly allocable to the Tribe. *Cf. Naporano Iron & Metal Co. v. United States,* 825 F.2d 403 (Fed. Cir. 1987) (under Equal Access to Justice Act contempo-

raneous records of time and usual rates necessary to determine reasonableness of charges).

In addition, the billing sheets do not clearly define the work devoted to the Tribe. Instead, the sheets distribute the hours worked between three clients: White Mountain Apache Tribe, Western Apache Tribe, and San Carlos Apache Tribe. The associated attorneys contend that the settlement for the Tribe had the same basis as that of a neighboring and related Western Apache Tribe—the San Carlos Apache Tribe. Thus, much of the work done was allocated equally between the San Carlos Tribe and plaintiff Tribe. From 1969-1982 the associated attorneys claim 385 hours allocable to plaintiff Tribe, 267.25 hours allocable to the San Carlos Tribe, and 9,218 hours divided equally between the two tribes. The total devoted to plaintiff Tribe would be half of the joint total (4,609 hours), plus the amount directly completed for the plaintiff Tribe (385 hours), yielding 4,994 hours.

The court is mindful of one overriding fact that distinguishes this case from the customary motion for fees in Indian claims cases. The associated attorneys rendered their services with the expectation that they would receive a percentage of the recovery, if any. However, the precedent dealing with fee shifting developed during the 1980's, largely under the aegis of the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2328 (codified at 28 U.S.C. § 2412(d) (1988)) (the "EAJA"). Although the Tribe insists that the associated attorneys should take nothing because their records do not show time spent on work and tasks performed for the Tribe, it would be unfair to find the associated attorneys' record-keeping fatally defective on the basis of current standards.

The associated attorneys ask the court to take the other extreme by awarding the flat 10-percent figure. They hypothesize that had the Tribe accepted the $13 million settlement in 1980, the Tribe would be in a better posi-

tion than receiving an award in 1993 of $19 million. As discussed earlier, this scenario assumes that one is comparing $13 million banked in 1980 with the 1993 judgment. The comparison is invalid since it assumes the Tribe would have banked all the proceeds. In fact, the Tribe recovered substantially more in 1992 than the settlement as a result of having litigated its claims. More importantly to the Tribe, it now has the satisfaction of knowing what its claims were worth, which, according to the Tribal Resolution adopted April 1, 1981, was a principal reason why the Tribe rejected the proposed settlement.

The associated attorneys also hypothesize that the Court of Claims would have awarded the 10 percent had the Tribe accepted the settlement and the matter been concluded in 1981. The associated attorneys therefore question why the situation should be any different now, especially since their contract is still valid and no other attorney seeks to participate in the award. The long answer is that a great deal of litigative and jurisprudential history ensued during the last decade. Were this a case wherein a firm was terminated incident to trial or settlement, the associated attorneys' claim would have some ethical appeal. In this case the entire resource and fiscal claims were developed and tried after the associated attorneys were no longer associated with the Tribe. A hypothetical more fitting to the facts of the instant case would have the Tribe rejecting the settlement in 1981 and then abandoning the claims without recovering anything. In such a case, the associated attorneys could not expect payment for their services. *Cf. Knight v. United States,* 982 F.2d 1573, 1584 (Fed. Cir. 1993) (attorneys seeking 25-percent contingency fee were not entitled to a fee when court of appeals decision left no basis for plaintiff's recovery).

In short, the associated attorneys either fail or refuse to grasp the significance of their total non-involvement

in the case during the 10 years leading up to the final award. This 10-year absence is the keystone to any analysis of the associated attorneys' claim. Any award that did not account for this long period of inactivity would be inequitable. If the associated attorneys had litigated the case to its conclusion, little question would exist that they would be entitled to the full 10-percent fee. They did not, however. Awarding a fee to the associated attorneys based on an result obtained by another attorney who has already been compensated would not only be incomprehensible, it would be wrong. A contingency fee is meant to be a merit-based form of compensation. It is not the guaranteed windfall that the associated attorneys appear to think it is.

B. *Determination of adjusted fee that associated attorneys are due*

1. *Authority of the court to determine fee*

This court has authority under both the Indian Claims Commission Act and the attorney contract between the associated attorneys and the Tribe to determine an adequate fee for services rendered to the Tribe. 60 Stat. 1053, § 15, Attorney Contract ¶ 8. The court must use its sound discretion in fixing an adequate fee, taking into consideration the factors enumerated in *Western Shoshone*. In addition, when more than one attorney has represented a claimant under separate contracts, the court must "determine whether any of the attorneys of record [are] entitled to compensation for [their] services in prosecuting the claim." *Pottawatomie Tribe v. United States*, 227 Ct. Cl. 739, 741 (1981). Once the court makes the determination of entitlement, " 'their fees will be apportioned on the entry of judgment in proportion to the value of their services to claimants.' " *Sisseton and Wahpeton Bands or Tribes v. United States*, 191 Ct. Cl. 459, 469, 423 F.2d 1386, 1391 (1970) (quoting *Beddo v. United States*, 28 Ct. Cl. 69, 76 (1893)).

Because the associated attorneys did not take part in the litigation of the suit that led to the final award of damages, it is inappropriate to use this award as the measure of value of the associated attorneys' services. This award reflects Mr. Veeder's work and does not reflect the work done by the associated attorneys.[5] No one is in a better position to pass on the relative capabilities of the associated attorneys and Mr. Veeder than this court, whose final task after years of arduous litigation is to assure that justice is done in a case of this magnitude and complexity. *See Godfrey v. United States,* 199 Ct. Cl. 487, 496, 467 F.2d 909, 914 (1972) (Indian Claims Commission was in "the best position to decide

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[5] The court notes that the associated attorneys fault Mr. Veeder's conduct of the litigation and point to instances where Mr. Veeder's advocacy has been taken to task by other courts. This court has presided over the *White Mountain* case since its assignment on January 25, 1983, with Mr. Veeder as counsel of record during all but 9½ months. For nine years during the litigation of its claims, the court has acquired total familiarity with the legal effort on the Tribe's behalf. The associated attorneys left no fingerprints on the case that eventually was passed on to Mr. Veeder. The 1978 trial record on certain fiscal claims was unusable, and this court tried the Tribe's fiscal claims in full. Mr. Veeder may be difficult and trying to the court's patience, but he has served as an absolutely dedicated advocate on the Tribe's behalf, and the Tribe has been fortunate to have his counsel.

The associated attorneys portray themselves as venerable Indian claims attorneys. The Weissbrodt firm is a long-established Washington, DC specialist and is highly regarded within the Indian claims legal community. The court has credited the associated attorneys' expertise, but this is just one factor to be taken into consideration under *Western Shoshone* and, as the associated attorneys themselves acknowledged during oral argument, is not one of the three most important factors to be considered in their view (loyalty to the interests of the Tribe, risks involved, and customary fees charged). The Court of Claims in *Western Shoshone* stated that section 15 emphasizes the results obtained and the contingent nature of Indian claims. 228 Ct. Cl. at 41, 652 F.2d at 51. In light of the discussion of the other factors, legal expertise certainly is not determinative.

the contribution of each group of lawyers" in fee litigation). Justice would be disserved if this court were required administratively to discharge 10 percent of the Tribe's hard-won judgment to the associated attorneys based on the showing that has been put forward on their behalf. Since no sum exists that actually inured to the benefit of the Tribe from which a percentage fee can be calculated, compensation is most appropriately awarded using a fixed fee. In determining the reasonableness of this figure, an hourly rate calculation gives the most accurate analysis of this award.

The court recognizes that the Court of Claims explicitly rejected use of the "lodestar" method in *Western Shoshone Identifiable Group*, 228 Ct. Cl. at 39, 652 F.2d at 49. The fixed fee the court has chosen was not derived using the lodestar method. Rather, this method serves as a useful and accurate means of assessing the reasonableness of a fixed fee.[6] *See Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1114 (8th Cir. 1982) (trial court's comparison of attorneys' potential hourly award to customary contingency percentages and fixed fee rates was proper). At any rate, this case is easily distinguishable from *Western Shoshone*. Unlike that case and the cases cited therein, this case involves attorneys who were neither under a contract at the time of the final judgment nor involved in any way in the litigation leading to the final judgment. The court in *Western Shoshone* relied on the statutory framework governing Indian claims cases in rejecting the lodestar method, citing the statute's consideration of "serv-

[6] Although the court tests the reasonableness of its award against the number of hours worked, were the associated attorneys to reopen the record to adduce support for more than approximately 5,000 hours that they documented in their original motion, the Tribe would have the right to demand support for all hours worked, and the proceeding would rocket out of orbit. Both parties had ample opportunity to brief the matter in 1992. Moreover, the hours would merely provide a test for reasonableness; the fixed award stands alone as reasonable.

ices rendered and results obtained, considering the contingent nature of the case." 228 Ct. Cl. at 39, 652 F.2d at 49. The petitioning attorneys in that case had "accomplished remarkable results for their clients." 228 Ct. Cl. at 40, 652 F.2d at 49. Unlike the associated attorneys, the attorneys in *Western Shoshone* had taken the case from its inception through numerous trials on different issues over a 30-year period and were discharged a mere 3 months before oral argument and 4 months before the Commission issued its final judgment in favor of the Western Shoshones. 228 Ct. Cl. at 34, 652 F.2d at 46. The *Western Shoshone* court thus had little difficulty assessing the benefit flowing to the claimant tribe from the attorneys' work.

In the instant case, it is difficult to assess what, if any, work performed by the associated attorneys contributed to the final judgment for the Tribe. In all other cases reviewed by this court, the petitioning attorneys made a substantial, quantifiable, and easily identifiable contribution to their client's recovery. In contrast, the services rendered and the results obtained by the associated attorneys in this case are insufficiently established to justify using a contingent fee calculation. Using a contingency analysis would result in a valuation of the associated attorneys' work that is based not on their work, but on Mr. Veeder's. Such a result was not contemplated by *Western Shoshone* and should not apply here.

In lieu of a fixed fee based on an hourly-rate calculation, the judicially "safer" way of determining the fee would be to resort to a percentage based calculation. While such a calculation is feasible, it would be inherently inaccurate and, in the view of the court, dishonest. Using a percentage calculation, the associated attorneys would only be entitled to a share of the 10-percent of the contingency that represented their proportional contribution to achieving the final award. In *Godfrey* the Court of Claims upheld a Claims Commission decision allocating 30 percent of the final award to co-counsel because the

efforts of lead counsel far outweighed co-counsel's efforts. 199 Ct. Cl. at 495, 467 F.2d at 913.

Even so, resort to either the final award or the settlement as the basis for calculating a percentage fee would yield a woefully unsatisfactory result. Using a percentage of the final award would focus on results obtained by a different lawyer and to which the associated attorneys' efforts contributed only marginally. The percentage to which the associated attorneys would be entitled would be commensurately small. Given the earlier determination by this court that the work product of the associated attorneys was virtually useless, an award of slightly more than one percent, and not a full 10 percent, is the maximum this court could justify awarding. Such a fee would imply that 10 percent of the work performed for the final award was performed by the associated attorneys.[7] Even with this generous, but quite insupportable and speculative amount, the resulting fee would be less than the $200,000.00 this court deems is appropriate as a fixed fee. Alternatively, if the proposed settlement negotiated by the associated attorneys is used as the base amount, the court would take into account the value of the settlement to the Tribe in calculating the percentage fee. As stated before, this settlement was rejected and this court may not second-guess the Tribe's reasons for doing so. The rejected settlement had little, if any, value to the Tribe. Again, a generous and unavoidably speculative fee of one percent[8] could be used to calculate the fee, resulting in an even smaller amount.

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[7] A 10-percent contingency award would yield a sum of $1,438,647.03. If the associated attorneys had performed 10 percent of the work in the case, they would be entitled to 10 percent of this sum, or $143,864.70.

[8] This would be equivalent to 10 percent of the amount traditionally awarded to attorneys who litigate a case to its conclusion and actually obtain a tangible, monetary benefit for their client. Again, using the method the associated attorneys suggest, this award would be made even though the Tribe received nothing from the proposed settlement.

In short, using a percentage-based calculation can only result in an arbitrary, speculative, and disingenuous valuation of the associated attorneys' work. *Western Shoshone* did not contemplate a situation such as the one at hand, and to follow the letter of this case merely because it did not anticipate the present dispute would amount to judicial sloth. The case at hand is glaringly different from the situation in *Western Shoshone* and every other case that this court has reviewed.

2. *Reasonableness of the fixed fee*

The 10-percent attorneys' fee provision of the Indian Claims Commission Act was meant to be an absolute limit on the compensation to be paid for " 'all services rendered in prosecuting the claim in question,' not merely to the fee of the particular counsel whose claim is being adjudicated." *Sisseton and Wahpeton Bands or Tribes v. United States,* 191 Ct. Cl. 459, 465, 423 F.2d 1386, 1389 (1970). While the amount that Mr. Veeder has been paid does not of necessity determine the exact amount to which the associated attorneys are entitled, it does emphasize the unreasonableness of a claim to the full 10 percent. As a starting point, since Mr. Veeder has been paid for his services, the associated attorneys cannot be entitled to the full 10-percent fee.

The court is further concerned both with the inability of the associated attorneys to identify in the time sheets submitted what work was being performed by the attorneys and for whom. The claim that work performed by attorneys benefited the tribes equally is not *per se* invalid. *See Red Lake and Pembina Bands,* 173 Ct. Cl. at 937, 355 F.2d at 941. Rather, it is the claim by the associated attorneys that the work was equally apportioned between the two tribes that raises concerns.[9] Uncertainty

[9] The only evidence submitted by the parties that could form a basis for evaluating the relative worth of the services to the San Carlos Tribe and plaintiff Tribe is the proposed settlements ne-

arising from imprecise recordkeeping are to be resolved against claimant attorneys. *International Travel Arrangers, Inc. v. Western Airlines,* 623 F.2d 1255, 1278 (8th Cir.), *cert. denied,* 449 U.S. 1063 (1980). Although the court declines to hold the associated attorneys to recordkeeping standards developed in the 1980's, some adjustment must be made for the lack of any meaningful attorney billing records. The court therefore deems it appropriate to discount by 15 percent the 4,609 hours claimed as allocable to the Tribe, but billed as equally split between the two tribes to compensate for the lack of specificity. This yields 3,917.7 hours. Both this amount and the amount directly allocated to the Tribe (385 hours) should be discounted another 15 percent for inability to explain what work was performed. This leaves 3,657.3 hours properly allocable to the Tribe.

If the court were to award the full 10 percent fee ($1,438,654.53), this would result in an hourly rate of $393.36 for the 3,657.3 hours allocable to the Tribe. Even if the unadjusted amount claimed is used, this yields an hourly rate of $289.12. Such fees are unusually high in 1993 and would have been quite unusual in the period from 1949-1982 during which the work claimed was actually performed.[10] This court may use its discretion to adjust the number of hours requested in attorney fee petitions. *Saxton v. Secretary of DHHS,* No. 93-5007, slip. op. at 9 (Fed. Cir. Aug. 31, 1993).

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gotiated by the associated attorneys. The $13 million settlement negotiated for the Tribe was 30-percent greater than the $10 million dollar settlement negotiated for the San Carlos Tribe. This suggests that the associated attorneys' services were at least that much more valuable to the Tribe. Although the court is unwilling to use the negotiated settlements as a basis for valuing the associated attorneys' efforts, reference to the settlements shows that the associated attorneys themselves did not apportion equal worth to their work.

[10] The court notes that the majority of the hours—3592.75 or 72 percent of the hours claimed—were worked between 1973 and 1978.

Due to the difficulty in assessing how much and what type of work was actually performed by the associated attorneys and the period when the work was performed, as well as the intangible benefits flowing to the Tribe from the associated attorneys' work, the court finds that a flat fee of $200,000.00 is appropriate compensation for the work performed. This sum would amount to an hourly rate of roughly $55.00 for the associated attorneys' time—an amount that more realistically reflects the rate of compensation during the period of 1949 to 1982 for Indian claims cases than the statutory limit of $75.00 per hour later imposed by the EAJA. 28 U.S.C. § 2412(d)(2)(A) (1988), *as amended by* Act of Aug. 5, 1985, Pub. L. 99-80 §§ 2, 6, 99 Stat. 184, 186 (1988).

The court finds a $55.00 hourly rate reasonable and appropriate for the duration of the services performed—1949-1982. Although this rate is substantially below the $200-$300.00 rate suggested by the associated attorneys in their supplemental brief, it is reasonable under the circumstances of the case. The plaintiff from whom the associated attorneys seek payment is an improverished Indian tribe. In the interest of justice, the impoverished state of the Tribe should be taken into account in fixing an appropriate fee.

In 1973 the United States District Court for the District of Columbia approved an attorneys' fee award in an Indian claim case based on a rate of $30.00 per hour. While the court referred to this as a "bedrock minimum" for compensation, it provides a useful, and unusually rare, point of comparison for awards involving Indian claims at this time. *Pyramid Lake Paiute Tribe of Indians v. Morton,* 360 F. Supp. 669, 672 (D.D.C. 1973), *rev'd on other grounds,* 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 962 (1975). The court based its finding on the impoverished nature of the plaintiff, the significant harm to the Tribe caused by the Government, the intransigent action of defense counsel, and the enhancement of public interests accomplished by the suit.

Similar factors present in the case at bar support the reasonableness of the $200,000.00 flat fee.

The associated attorneys submit that the court should calculate the appropriate fee using the customary hourly rate charged for similar work in 1993. Citing *Catlett v. Missouri Highway & Transp. Comm'n,* 828 F.2d 1260, 1271 (8th Cir. 1987), *cert. denied,* 485 U.S. 1021 (1988), the associated attorneys argue that the delay in receipt of fee payment so dilutes the award as to make it unreasonable. Under *Missouri v. Jenkins,* 491 U.S. 274, 278-84 (1989), a court may adjust for such dilution by basing the fee award on current rates or by determining the present value of the award.

Before a court adjusts a fee, however, it must determine that the delay in payment makes the fee unfair. Such a situation does not exist in the present case. Again, the absence of the associated attorneys from the 9 years of active litigation leading up to the award is crucial to the analysis. The delay in payment of the fee award was not caused by an intractable client; it occurred because the associated attorneys were discharged and another attorney undertook to prosecute the Tribe's claims from beginning to end without any contribution from the associated attorneys. The Tribe was essentially forced to start over with its claims.

This court is not the proper forum to determine whether or not the discharge of the associated attorneys by the Tribe was justified. The court merely acknowledges that it occurred; the record provides no basis for an inference that the discharge wrongfully prejudiced the associated attorneys. Absent such a showing, the delay cannot be viewed as unfair. Were this court to use the present rates suggested by the associated attorneys, it would result in an unearned windfall to them and an unjustifiable penalty to the Tribe. No adjustment for delay is warranted in this case.

Finally, the associated attorneys claimed in their motion for leave to supplement the record with information relative to the lodestar approach that they were unaware that the court was considering awarding a fixed fee. As discussed in the procedural history of the case, this intention was made clear in two prior orders filed by this court approximately one year before the associated attorneys filed their motion to supplement. This objection therefore is unfounded.

II. *Attorneys' expenses*

Mr. Weissbrodt seeks reimbursement for expenses totalling $75,205.44. In order for an attorney to recover expenses for services rendered, "[t]he petition for reimbursable expenses shall be itemized showing time, place, purpose and amount of each item incurred or paid by the applicants, and as to items paid by or on behalf of the applicants there shall be filed with the petition, receipts or other evidences of payment. . . ." 25 C.F.R. § 503.34b (a) (1979). The documentation submitted in support of Mr. Weissbrodt's motion shows nine categories of expenses:

A.	Purchase of Materials and Services:	$ 1,299.01
B.	Expert Assistance:	
	1. Berman, Goldman & Ribakow—Accountants	$13,105.00
	2. Nicklason Research Associates—Historians	$26,726.08
	3. William Woolford & Associates—Range Experts	$ 2,935.91
	4. Wesley Rickard, Inc.—Timber Experts	$ 6,226.50
C.	Research Assistant	$12,786.36
D.	Travel Expenses	$ 1,356.61
E.	Stenographic, Typing & Clerical Services	$ 6,966.41

F.	Long Distance Telephone	$ 500.10
G.	Local Fares	$ 245.43
H.	Duplication of Documents	$ 3,011.75
I.	Extra Postage	$ 46.28
	Total	$75,205.44

In support of these expenditures, Mr. Weissbrodt has submitted detailed records, including attorney affidavits, cancelled checks, invoices, ledger entries, receipts, and other documentation indicating the persons or firms providing the services and the dates and amounts paid for such services. The expenses are, on the whole, well documented and specifically designated as allocable to the Tribe.

The Tribe has claimed that some of the expert witness fees should not be allowed because they might have been paid out of an expert witness loan obtained by the Tribe from the Department of Interior. The loans, however, were obtained after the periods claimed by the associated attorneys. The court finds the documentation submitted sufficient to prove the amounts claimed. All expenses claimed will be allowed.

CONCLUSION

I.S. Weissbrodt's motion for attorneys' fees and expenses is granted to the following extent: The court awards the associated attorneys a fee of $200,000.00 for services rendered to the Tribe in the prosecution of Docket No. 22-H, plus expenses, for a total award of $275,205.44. The Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

No costs.

/s/ Christine Cook Nettesheim
CHRISTINE COOK NETTESHEIM
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 85-895 and 85-1348

WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Appellant/Cross-Appellee,

v.

THE UNITED STATES,
Appellee/Cross-Appellant.

DECIDED: August 7, 1985

Before BALDWIN, NEWMAN, and BISSELL, *Circuit Judges.*

BALDWIN, *Circuit Judge.*

DECISION

The decision of the United States Claims Court, dismissing with prejudice all claims of the White Mountain Apache Tribe (Tribe) for failing to comply with pretrial orders of that court, is *vacated and remanded.* The Claims Court's entry of judgment in the amount of $10 million in favor of the Tribe is also *vacated.*

OPINION

Dismissal of the Tribe's Claims

Although we see no error in the Claims Court's orders requiring the pretrial preparation and exchange of expert reports, we send this case back to the Claims Court to give the Tribe one final opportunity to comply with that court's pretrial orders. We do so because we believe that the Tribe's failure to comply has been based on its misunderstanding of the effect of the Claims Court's orders and the procedural rules and law supporting those orders. We also rely on the sincerity of the representations made by the Tribe's counsel at oral hearing before us that the Tribe is ready and willing to comply with lawful court orders.

The Tribe's main concern is that the Claims Court's order would deny the Tribe its "day in open court." This concern is unfounded.

The November 7, 1983 Order permits the parties to proceed by both written *and oral testimony* at trial. In the February 7, 1984 Opinion and Order, the court reiterated its intent to hear oral testimony of witnesses at trial:

> [T]rial, insofar as expert testimony is concerned, will be based on, but by no means limited to, expert reports. An expert's direct testimony can highlight his report, explain points that require elaboration, and summarize. Cross-examination will proceed in open court.

Even at oral hearing before us, counsel for the Tribe agreed that the Claims Court orders would not bar it from presenting oral testimony. The Tribe's contention, based on the Claims Court Rules including rule 43(a), is simply that the Claims Court cannot receive into evidence at trial any amount of written testimony (*e.g.*, in the form

of written expert reports)—that is, all evidence introduced at trial must be by means of oral testimony.

This court's August 1, 1984 order (No. 84-1434) rejects the Tribe's contention and is law of the case. The Claims Court's pretrial orders are consistent with that court's rules and the applicable Federal Rules of Civil Procedure incorporated by those rules. Indeed, the use of written expert reports makes good sense in this unique case where the Tribe's claims are admittedly complex and involve thousands of pages of archival documentation stretching over a period of at least 75 years.

The Tribe's further contention, that the Claims Court orders deprive it of constitutional due process, is premature. There has been no trial yet. Nor has the Claims Court done anything to indicate that it would deprive the Tribe of a proper opportunity to present its case and counter the government's case at the forthcoming trial.

We leave it to the Claims Court judge on remand to allow the Tribe a reasonable time to comply with its pretrial orders.

The Award of $10 Million

That part of the Claims Court's judgment awarding $10 million to the Tribe must be vacated as there is no jurisdictional basis for such an award. The government's earlier offer of settlement cannot be used as a basis for an award in lieu of evidence adduced at trial.

Although the Tribe may justly deserve an award on its fiscal and mismanagement claims, justice requires that the Tribe prove the merit of its claims by a trial according to orderly court procedures.

BISSELL, *Circuit Judge*, dissenting in part.

I respectfully dissent from that portion of the majority's decision which vacates the decision of the Claims Court dismissing the Tribe's claims. Although I am not without sympathy for the majority's view, the question is not whether this court as an original matter would have dismissed the action; it is whether the Claims Court abused its discretion in so doing. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

Under the circumstances of this case, I can find no abuse of discretion on the part of the Claims Court and thereby no grounds for reversal. By reversing, absent a finding of an abuse of discretion, we undermine the necessary power of the Claims Court to invoke sanctions in order to prevent undue delays in the disposition of pending cases and to avoid congestion in its calendar. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

As was stated in *National Hockey League*:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League, 427 U.S. at 642-43.

It logically follows that the Tribe may faithfully comply with all future pretrial orders entered by the Claims Court, but other parties to other lawsuits may well feel freer, than I think Claims Court Rules 16 and 37 contemplate they should feel, to flout other pretrial orders of the Claims Court.

SUPREME COURT, U.S.
WASH. D.C.
SEP 9 1994
OFFICE OF THE CLERK

No. 94-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,

Petitioner,

v.

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA AND THE UNITED STATES,

Respondents.

Response Of White Mountain Apache Tribe Of Arizona In Opposition To Petition For Writ Of Certiorari Filed By Israel S. Weissbrodt

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. VEEDER
Counsel of Record
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for Respondent White Mountain Apache Tribe of Arizona

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-240

ISRAEL S. WEISSBRODT,

Petitioner,

v.

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA AND THE UNITED STATES,

Respondents.

Response of White Mountain Apache Tribe of Arizona In Opposition to Petition For Writ Of Certiorari Filed By Israel S. Weissbrodt

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INTRODUCTION

The Court's Rule 15 admonishes Respondent White Mountain Apache Tribe of Arizona to ". . . address any perceived misstatements of fact or law set forth in the petition" for writ of certiorari filed here by Israel S. Weissbrodt "which have a bearing on the question of what issues would properly be before the Court if certiorari were granted."[1]

Respondent Tribe stresses to the Court that the issues which Petitioner Weissbrodt seeks to present to the Court for review have all been resolved against him. Reference in that connection is made to the July 12, 1994 Judgment

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[1] Rule 15, Rules of the Supreme Court of the United States.

of the Court of Appeals for the Federal Circuit.[2] The Judgment of the Court of Appeals affirmed the November 4, 1993 Opinion of the Court of Federal Claims.[3] The trial court's Opinion, thus affirmed, is replete with unchallenged findings against Petitioner Weissbrodt and is res judicata respecting all of the issues that Petitioner Weissbrodt seeks to have the Court review.

A critical fact respecting the issues presented by Petitioner Weissbrodt is that he failed to recognize that Chairman Ronnie Lupe and the Tribal Council were fully aware of the grave threats to their future due to the suppression by agents of the United States Trustee of all water resource development on Tribe's Reservation. Reference is made to the fact that the trial court initially found that Respondent Tribe had retained Counsel in an effort to preserve, protect and exercise Tribe's invaluable, indeed life-sustaining reserved rights to the use of water in the Salt River.[4] That stream has its source within Tribe's Fort Apache Indian Reservation. It is most relevant that the trial court likewise found, that:

> Tribal Council Chairman Ronnie Lupe raised the concern that ¶ 6 of the settlement offer would require the Tribe to waive its rights to other claims, including water rights and land recovery claims.[5]

Petitioner Weissbrodt's statements to the Court that a recommendation by a low level government lawyer could

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[2] Pet.App. A, p. 1a; In the United States Court of Appeals for the Federal Circuit, No. 94-5036; *White Mountain Apache Tribe of Arizona, Plaintiff-Appellee v. United States, Defendant-Appellee, v. Israel S. Weissbrodt,* Movant-Appellant, Judgment. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED . . .; AFFIRMED, See Fed. Cir. R. 36.

[3] Pet. App. B, p. 2a, Trial Court Opinion; *see infra* p. 23-26.

[4] Pet. App. B, 6a; 30 Fed.Cl.8, 11 (1993).

[5] *Ibid.*, [Sec. 6] That the judgments entered into pursuant to this settlement shall finally dispose of all rights, claims, and demands which the plaintiffs have asserted or could have asserted against the defendant under the provisions of the Indian Clams Commission Act in Docket No. 22-H before the Court of Claims.

in any way preserve and protect Tribe's Salt River rights against the adverse claims of the United States Trustee partakes of the ridiculous.[6] It is likewise ridiculous for Petitioner Weissbrodt to state that Counsel for Respondent Tribe could unduly influence the Tribe in regard to the Tribe's efforts to preserve and protect its land and life-sustaining water resources. Most assuredly Respondent Tribe was fully aware of the problems involved and could not possibly be unduly influenced by Counsel, as the trial court found, all as will be hereafter reviewed and documented.

TRIAL COURT'S OPINION AFFIRMED ON APPEAL PRECLUDES REVIEW OF ISSUES PRESENTED BY PETITIONER WEISSBRODT

I.

"The Results Obtained" by Petitioner Weissbrodt[7] "Essentially Nil;"[8] "Virtually Useless"[9]

Petitioner Weissbrodt was awarded by the Court of Federal Claims fees of $200,000.00 for services rendered to Respondent Tribe in the prosecution of Docket No. 22-H, plus expenses, for a total award of $275,204.44.[10] That award has been challenged here by Petitioner Weissbrodt on the grounds that it is grossly insufficient. Respecting that award, the trial court reviewed in depth and in detail the results obtained by Petitioner Weissbrodt on behalf of the Tribe and rejected Petitioner Weissbrodt's contention that he was entitled to a fee of $1,300,000.00, which is 10% of Petitioner Weissbrodt's proposed $13,000,000 settlement which the Tribe had rejected.[11]

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[6] Pet. p. 4, *et seq.*

[7] Pet. App. B, p. 11a, *et seq;* 30 Fed.Cl. 8, 14 (1993).

[8] Pet. App. 13a; 30 Fed.Cl. 8, 14 (1993).

[9] Pet. App. B, 25a; 30 Fed.Cl. 8, 20 (1993).

[10] Pet. App. B, 31a; 30 Fed.Cl. 8, 22-23 (1993).

[11] Pet. App. B, 5a, 12a-13a; 30 Fed.Cl. 8, 11, *et seq.* (1993).

Following an intensive review of the record, the trial court found these facts:

> A rejected settlement . . . cannot reasonably be termed a 'result accomplished' *that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained* by the associated attorneys [Petitioner Weissbrodt] *for the Tribe was essentially nil.*[12]

Continuing, the trial court found that some of the services performed by Petitioner Weissbrodt "provided some benefit to the Tribe," declaring, nevertheless, that:

> . . . the record belies the associated attorneys' [Petitioner Weissbrodt's] assertion that the value of these services should be measured using either the proposed settlement or the final award as lodestars.[13]

Thereafter, the trial court found that:

> Based on the record and the court's first-hand knowledge of the trials, it is clear that the research performed by the associated attorneys [Petitioner Weissbrodt] was not used in obtaining the final judgment. The research undertaken for the settlement was never turned over to the Tribe.[14]

Having reviewed the alleged services rendered by Petitioner Weissbrodt for the benefit of the Tribe respecting the fiscal aspects of Tribe's claim, the court found as a fact:

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[12] Pet. App. B, 12a-13a, *et seq.;* 30 Fed.Cl. 8, 14 (1993). (Emphasis supplied).

[13] *Ibid.*

[14] *Ibid.*

> [Petitioner Weissbrodt contends that his] . . . work was instrumental in obtaining . . . the accounting report . . . The court acknowledges this work in its calculation of the award due on the motion for fees . . . . Under these circumstances, the court is justified in substantially limiting the award due the associated attorneys [Petitioner Weissbrodt].[15]

It is of controlling importance that those explicit findings respecting "the results obtained" by Mr. Weissbrodt for the benefit of Respondent Tribe were never challenged on appeal by Mr. Weissbrodt, and as a consequence the affirmance of that judgment is conclusive against Petitioner Weissbrodt and is not subject to review by the Court.[16]

Failure of Petitioner Weissbrodt to Sustain His Burden of Proof

The courts have vigorously enforced the principle that there resides with the attorney seeking fees the burden of proving the services for which he seeks payment, what he did, and the value of those services.[17] In stressing the inadequacies of Petitioner Weissbrodt's attempt to prove his claim, the trial court entered specific findings which findings were never challenged and are binding here upon Petitioner Weissbrodt. Respecting Petitioner Weissbrodt's futile efforts to sustain his claim, the trial court referred to the data he submitted and found that:

> These submissions . . . cause concern *due to lack of specificity, regarding the nature of the work and the client for whom the work was done.*[18]

In addition, the trial court found that "[t]he sheets submitted contain only the number of hours worked, and do not provide any sort of description of the work per-

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[15] *Ibid.* p. 14a; p. 14-15.

[16] *Infra.* p. 23-26.

[17] *Infra.* p. 21-23.

[18] Pet. App. B, p. 18a, 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

formed." Due to those transcendent failures, the court concluded that it: "*. . . has no basis for determining whether the amounts claimed are properly allocable to the Tribe.*"[19]

Failure of Petitioner Weissbrodt properly to support his contrived claims is established by these additional findings of the trial court:

> . . . the sheets distribute the hours worked between three clients: White Mountain Apache Tribe, Western Apache Tribe, and San Carlos Apache Tribe.[20]

Finally, the trial court found that:

> *In the instant case, it is difficult to assess what, if any, work performed by the associated attorneys [Petitioner Weissbrodt] contributed to the final judgment for the Tribe . . . the services rendered and the results obtained by the associated attorneys [Petitioner Weissbrodt] in this case are insufficiently established to justify using a contingent fee calculation.*[21]

After continuing its intensive review of the failure of Petitioner Weissbrodt to establish ". . . a substantial, quantifiable, and easily identifiable contribution . . .,"[22] the trial court made this specific evaluation respecting Petitioner Weissbrodt's claims for fees:

> *Given the earlier determination by this court that the work product of the associated attorneys, [Petitioner Weissbrodt] was virtually useless, an award of slightly more than one percent, and not a full 10 percent, is the maximum this court could justify awarding.*[23]

Failure of Mr. Weissbrodt in his petition to this Court to set forth and explain the findings respecting the grave

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[19] Pet. App. B, p. 18a; 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

[20] Pet. App. B, p. 19a; 30 Fed.Cl. 8, 17 (1993).

[21] Pet. App. B, p. 24a, 30 Fed.Cl. 8, 19 (1993). (Emphasis supplied).

[22] Pet. App. B, p. 24a; 30 Fed.Cl. 8, 19 (1993).

[23] Pet. App. B, p. 25a; 30 Fed.Cl. 8, 20 (1993). (Emphasis supplied).

deficiencies in the information he submitted to support his unconscionable claim underscores the general inadequacy of his presentation here.

ARGUMENT

CONTRAST—NOT COMPARISON—BETWEEN RESPONDENT TRIBE'S FINAL JUDGMENT AND PETITIONER WEISSBRODT'S REJECTED SETTLEMENT

Petitioner Weissbrodt's futile attempt to compare one phase of Respondent Tribe's final judgment—the $19M—with the rejected $13M settlement that he espoused could only be undertaken with the objective of misleading the Court. Throughout his entire Petition, Mr. Weissbrodt misstates the amount of the award to the Tribe as being $14.4M. To present even a remote comparison between Tribe's final judgment and the rejected $13M settlement, it was essential for Mr. Weissbrodt to deduct from the Tribe's $19M, "$4 1/2 million in interest."[24] Desperation to create a comparison where none exists is the explanation for Petitioner Weissbrodt's misrepresentation to the court that the almost $5M in interest awarded to the Tribe was not part of the Tribe's final judgment.

The trial court specifically declared that title to Tribe's Salt River rights remained in Respondent Tribe irrespective of the aggressive claims to the contrary by the United States.[25] The trial court rejected repeated efforts by Petitioner Weissbrodt to compare Tribe's final judgment with the rejected $13M settlement, stating that Mr. Weissbrodt hypothesized:

> *. . . the Tribe would be in a better position than receiving an award in 1993 of $19,000,000 . . . The comparison is invalid . . . In fact, the Tribe recovered*

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[24] Pet. p. 9.

[25] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 629, 638 (1987).

substantially more in 1992 than the settlement as a result of having litigated its claims.[26]

Included in that "substantially more," as found by the trial court, is the explicit affirmation by the trial court of Tribe's title to its priceless reserved Salt River rights. Respecting that affirmance, the trial court found that the Secretary of the United States, Department of the Interior, had constructed for the non-Indian Salt River Water Users ". . . the Salt River Federal Reclamation Project . . ." which secretarial project, as found by the trial court, was designed and constructed to utilize ". . . all of the natural and surplus flow of the Salt River coming off the [Tribe's] Reservation . . . ."[27] It is equally significant that the trial court found that the Secretary of the Interior had planned and constructed the Roosevelt Dam and Reservoir upon the postulate ". . . that no upstream diversions would diminish the flow into the Reservoir."[28]

It was with the full knowledge by Respondent White Mountain Apache Tribe of the aggressive adverse claims of the Secretary of the Interior to all of the Salt River waters on Tribe's Reservation that the Tribe directed Counsel fully to try the issues respecting the claim of the Secretary to Tribe's title to the Salt River water. Respondent Tribe was fully rewarded for its courageous challenge of the Secretary of the Interior and the downstream politically powerful non-Indian water users when the trial court entered its judgment in favor of the Tribe declaring, decreeing, and determining that: ". . . it can be found that the Government officials . . . periodically took the position that the . . ." claims to the Salt River water by the Salt River Federal Reclamation Project ". . . were prior to and superior to the Tribes. *This view-point was incorrect.*"[29]

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[26] Pet. App. B, 19a-20a; 30 Fed.Cl. 8, 17 (1993). (Emphasis supplied).

[27] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 623 (Cl.Ct. 1987).

[28] *Ibid.*, p. 629.

[29] *Ibid.*, p. 638 (1987). (Emphasis supplied).

The trial court explicitly adjudged and declared:

> *Plaintiff's* Winters *Doctrine rights . . . take their life from the date, at the latest, when the reservation was created . . . and have priority over the rights asserted by the later-created . . .*" Secretarial Salt River Federal Reclamation Project.[30]

The value of Tribe's reserved Salt River rights to the use of water has been conservatively appraised by Respondent Tribe's experts as being $250,000,000. Rule 15 of the court was clearly violated by Petitioner Weissbrodt when he failed to bring to the court's attention that a critical aspect of the judgment entered on behalf of Respondent Tribe was the explicit affirmation that the Tribe had retained its title to those irreplaceable reserved Salt River rights for use on "49,800 acres . . . which are practically irrigable."[31] That adjudication precludes any further effort on the part of Petitioner Weissbrodt to compare the judgment entered on behalf of the Tribe after its full trial on the merits with Petitioner Weissbrodt's rejected $13M settlement.

It is equally important to Respondent Tribe that the trial court found as a fact that:

> . . . the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, *in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.*[32]

The trial court did not award commensurate damages for the injury the Tribe had sustained and is sustaining due to the accelerated erosion. A remedy for the Tribe is imperatively required by reason of the fact that its Reservation is literally washing away today. Whether a leg-

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[30] *Ibid.*, (Emphasis supplied).

[31] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 627 (1987).

[32] *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl.Ct. 614, 659 (1987). (Emphasis supplied).

islative remedy is available is not known. Nevertheless, the proof of the environmental catastrophe and the fixing of responsibility on the United States Trustee warranted the trial, if for no other reason.

Hallmark of Petitioner Weissbrodt's failure to fulfill his professional obligation to the Tribe is exemplified by his settlement of Tribe's claims for the taking of its aboriginal lands in Docket No. 22-D. Petitioner Weissbrodt left unresolved the ongoing, harsh, and bitter controversies with the United States Trustee in regard to Tribe's invaluable reserved Salt River rights to the use of water and, as stated above, the mismanagement of Tribe's rangelands through overgrazing that gave rise to the accelerated erosion, and the gross mismanagement of Tribe's magnificent forest lands by overcutting far in excess of the safe annual yield. Moreover, Petitioner Weissbrodt—under highly suspicious circumstances—settled Tribe's claims involving Tribe's aboriginal lands outside the Reservation without resolving the Tribe's ongoing controversy with the Trustee over the correct location of Tribe's northern boundary. In explicit terms, the Executive Orders of 1871 and 1872 creating the Tribe's Reservation, designated the northern boundary of the then White Mountain Apache Reservation as being "the south edge of the Black Mesa." A controlling fact respecting "the south edge of the Black Mesa" is that it is a well defined, well known, and easily recognized natural monument. Rather than following that well defined natural monument, an agent of the United States Trustee, in surveying that northern boundary, departed drastically from "the south edge of the Black Mesa." That erroneous survey, contrary to the governing principles of law, has resulted in the exclusion from Tribe's reservation of 16,090 acres of Tribe's aboriginal lands, substantial portions of which were comprised of invaluable ponderosa pine forests. It is an elemental principle of law that an erroneous survey cannot change a boundary which is a designated natural monument as here.[33]

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[33] *United States v. State Investment Co.*, 264 U.S. 206, 211 (1924);

Petitioner Weissbrodt ignored that principle and made no effort to resolve the boundary dispute antecedent to settling the Tribe's land claims. It typifies the trial court's assessment of Petitioner Weissbrodt's failure to render any services of value to the Tribe.

PETITIONER WEISSBRODT'S "QUESTION PRESENTED" IS A FALSIFIED, DISTORTED MISSTATEMENT, STRIPPED FROM CONTEXT OF THE TRIAL COURT'S FINAL OPINION AND SHOULD BE REJECTED

Initially, let it be emphasized that the falsified "Question Presented" has never previously been raised in either the trial court or the Court of Appeals for the Federal Circuit. Accordingly, predicated upon unvarying precedents, all as will be reviewed, Mr. Weissbrodt's petition should be rejected. This is the "Question Presented" as set forth above, together with Petitioner Weissbrodt's accompanying interpretive statement, both of which are false.

> Where the 'results obtained' by an attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is 'essentially nil' *per se* and is not to be considered in ruling on a fee application. App. at 13a.

Petitioner Weissbrodt departs drastically from his professional responsibility to the Court when he seeks to have this Court review the following nonexistent question: ". . . is it the case that no value is to be placed on ob-

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Oklahoma v. Texas, 268 U.S. 252, 256 (1925); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Puyalup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257, n.6 (1983); *Moore v. United States*, 157 F.2d 760, 762 (CA 9, 1946); *cert. den.* 300 U.S. 827 (1947); *United States v. Walker River Irrigation District*, 104 F.2d 334, 337 (CA 9, 1939); *Northern Pacific Railroad Co. v. United States*, 227 U.S. 325, 355 (1913).

taining a settlement offer that the client rejected before hiring substitute counsel?"

That statement does not appear in the trial court's opinion here for review. It is totally contrived. Compounding the falsity of that statement is the sentence that follows the "Question Presented." Contrary to fact, it is stated, "The lower courts held that the value of such a settlement offer is 'essentially nil' *per se* and is not to be considered in ruling on a fee application."

It is noteworthy that Petitioner Weissbrodt cites "App. at 13a" in support of those misstatements. A review of that page establishes beyond controversy that neither the quote or Petitioner Weissbrodt's interpretation of the quote will be found at the reference cited by Respondent Weissbrodt or elsewhere in the opinion.

On the last-cited page 13a of the trial court's opinion, that court found that:

> *A rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.*[34]

Petitioner Weissbrodt has totally stripped from context the term "essentially nil," perverted the facts to which the term pertains, and fabricated his petition predicated upon that perversion. It is a gross violation of professional responsibility.

In simplest terms, the trial court stated that Petitioner Weissbrodt was not entitled to 10% of the $19M awarded to Petitioner Tribe by reason of the fact that the $19M judgment resulted from the preparation and full trial on the merits of litigation in which Petitioner Weissbrodt did not participate.[35] Having falsified the finding in the "Ques-

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[34] Pet. App. B, p. 13a; 30 Fed.Cl. 8, 14 (1993). (Emphasis supplied).

[35] *Ibid.*

tion Presented," Petitioner Weissbrodt proceeded falsely throughout the entire petition. For example, he declared that the trial court in rendering its opinion, "did not acknowledge the cases" which addressed Petitioner Weissbrodt's falsified issue

> . . . without applying any *per se* rule that a rejected settlement must be ignored . . . nor did it cite any case embracing the [falsified] *per se* rule.[36]

Under the heading of "Reasons for Granting the Writ," Petitioner Weissbrodt urges to the Court that, by applying the nonexistent *per se* rule, "the lower courts . . . shifted a major element of economic cost of rejecting a reasonable settlement . . ."[37] upon the Counsel making the recommendation for the settlement. Contrary to facts found by the trial court, Petitioner Weissbrodt states that, by hiring new counsel, Respondent Tribe ". . . effectively received thirty years' worth of legal services for close to no fee. Such a windfall [had it actually occurred] would appear unfair in any event."[38] Let it be reiterated here that throughout the "thirty years' worth," Petitioner Weissbrodt did not, as explicitly found by the trial court, render anything but minimal services that were "virtually useless" to Respondent Tribe.[39]

Petitioner Weissbrodt states that ". . . this case provides a paradigm of the type of case most likely to suffer . . ." from the falsified *per se* rule, "applied by the lower courts . . . ."[40] For Petitioner Weissbrodt to suggest that the falsified and contrived case that he has presented to the Court constitutes a model or pattern which should be considered by the Court is another gross example of Petitioner Weissbrodt seeking to mislead the Court. Petitioner Weissbrodt refers to Respondent Tribe as:

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[36] Pet. p. 11-12.

[37] Pet. p. 13.

[38] *Ibid.*, p. 12-13, *et seq.*

[39] Pet. App. p. 25a.

[40] Pet. 14.

> . . . a group of people that were numerous enough to have a multimillion dollar claim . . . in which a relatively compact—but still potentially fractious—group stands to share in a large recovery, that are often the most consuming of judicial resources.[41]

Pursuing those false concepts and applying the equally false *per se* rule, Petitioner Weissbrodt states that the litigants in cases of this character:

> . . . are those most often susceptible to the 'volunteer' 'spoiler' counsel, who attack a proposed settlement with the promise of a huge recovery and hints of a sell-out by the original counsel who is recommending settlement.[42]

Petitioner Weissbrodt then states that provision should be made ". . . for the award of compensation to the original counsel as if the initially negotiated settlement had been accepted . . ."[43] The complete and total answer to the false posturing of Petitioner Weissbrodt is once more to remind him that the Tribe's judgment was $19M—and not $14M—as he continued to misstate. Moreover, Petitioner Weissbrodt failed to take cognizance of the vast benefits accruing to the Tribe by the full trial on the merits which resulted in the trial court's affirmance of Tribe's title to the invaluable reserved Salt River rights and the fixing of liability upon the United States Trustee for the environmental catastrophe on Tribe's Reservation.[44]

Respondent Tribe's last statements as to the immense value to the Tribe of the full trial on the merits constitutes a complete answer to Petitioner Weissbrodt's false question, false statements, and false arguments, and likewise refutes totally Petitioner Weissbrodt's concluding declaration that:

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[41] Pet. p. 14-15.

[42] Pet. p. 16.

[43] *Ibid.*, p. 16.

[44] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 629, 638, 652, 659 (1987).

> The benefits of a settlement in 1980 would have been enormous. The Tribe would have received a far better recovery. [Petitioner Weissbrodt concluded with this non sequitur]. Ten years of complex litigation, punctuated by frequent frivolous positions by the plaintiff *would have been permitted.*[45]

Respondent Tribe's summary of the results it achieved through the full preparation and trial on the merits of its claims against the United States Trustee renders ludicrous Petitioner Weissbrodt's reiteration of his mindless argument that the Tribe would have been better served to accept the $13M settlement. Petitioner Weissbrodt continues his posturing by advising the Court that this case affords it an opportunity

> . . . to enunciate a proper rule: that the rejected settlement must be viewed as a result obtained [irrespective of the facts]; and that in appropriate cases a percentage fee based on the settlement must be awarded to Counsel presenting a settlement which is then rejected, to the extent that ultimately there is a recovery.[46]

The trial court fully answered that innane proposal in its opinion:

> Awarding a fee to the associated attorneys [Petitioner Weissbrodt] based on an [sic] result obtained by another attorney who has already been compensated would not only be incomprehensible, it would be wrong. A contingency fee is meant to be a merit-based form of compensation. It is not the guaranteed windfall that the associated attorneys [Petitioner Weissbrodt] appear to think it is.[47]

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[45] Pet. p. 19.

[46] *Ibid.*

[47] Pet. App. p. 21a.

PETITIONER WEISSBRODT, IN THE "STATEMENT"[48] HAS PERVERTED THE FACTS AND DISTORTED THE LAW TO SUPPORT THE FALSIFIED *PER SE* RULE

There has been reviewed above the falsified question that misrepresents to this Court that the trial court's opinion here for review applied the "*per se*" rule that a rejected settlement must be ignored in fixing an attorney's fees. Petitioner likewise states that the trial court did not cite any case embracing the "*per se*" rule.[49] That is not surprising by reason of the fact that at no time did the trial court or the Court of Appeals mention that nonexistent "*per se*" rule. Continuing to violate the express language of the trial court's opinion, which is controlling here, Petitioner Weissbrodt states that Counsel misled Respondent Tribe by offering the Tribe ". . . visions of a huge judgment, amounting to more than ten times the amount of the proposed settlement—and exceeding by a similar factor the actual $14.4M judgment finally obtained after another decade of litigation."[50]

In rejecting comparable misstatements made below by Petitioner Weissbrodt, the trial court early on found as a fact that Petitioner Weissbrodt has "made allegations that the Tribe was unduly influenced by Mr. Veeder."[51] The trial court then entered these findings: Petitioner Weissbrodt has ". . . introduced no evidence to indicate that the Tribe's decision was irrational or the product of undue influence." By way of emphasis, the trial court then found that "[e]vidence to the contrary abounds."[52] On the basis of that emphatic declaration that Counsel did not engage in unduly influencing Respondent Tribe, the trial court then declared:

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[48] Pet. p. 3-12.

[49] Pet. p. 11-12.

[50] Pet. p. 5.

[51] *Ibid.*

[52] Pet. App. B, 12a-13a; 30 Fed.Cl. 8, 14 (1993).

> Absent significant evidence of fraud or mutual mistake, this court is unwilling and unable to question the validity of the Tribe's decision.[53]

It is essential to reiterate here that the critical finding that there was no undue influence by Respondent Tribe's Counsel and the affirmation of that finding on appeal—predicated on the principles of *res judicata*[54]—totally precludes Petitioner Weissbrodt's efforts to mislead the Court by his vituperative and false charges against Counsel. It is likewise reiterated that throughout Petitioner Weissbrodt's Statement, he has continued to falsify the monetary recovery received by the Tribe. After a full trial on the merits, the Tribe was awarded $19M as part of the judgment in its favor, as distinguished from the $14.4M which Petitioner Weissbrodt has falsely presented throughout. Petitioner Weissbrodt had utilized those false charges in an unsuccessful effort to compare Tribe's final judgment, as it pertains to the monetary award to the Tribe, with the $13M settlement proposed by Petitioner Weissbrodt which was rejected by Respondent Tribe, as reviewed above.

With customary savagery, Petitioner Weissbrodt charges Counsel with consumption of judicial resources; disobeying court orders; and prosecuting appeals.[55] Petitioner Weissbrodt referred to the fact that the trial court dismissed Tribe's complaint.[56] Reference is then made by Petitioner Weissbrodt to the fact that the Court of Appeals reversed the trial court, restored the Tribe's complaint and directed a continuation of the proceedings.[57] However, it is of interest that Petitioner Weissbrodt refer only to the dis-

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[53] Pet. App. B, p. 12a-13a; 30 Fed.Cl. 8, 14 (1993).

[54] *Infra.*, p. 23-26.

[55] Pet. p. 6-8.

[56] *Ibid.*

[57] Pet. p. 6-11, Contains false statements as to the value of the settlement to the Tribe which was repeatedly rejected by the trial court. *See*, Pet. App. 22a, 30 Fed.Cl. 8, 18-19 (1993).

senting decision which can be read as criticizing Tribe's Counsel.

The entire Petition is a studied attack upon the very same trial court that originally dismissed Tribe's complaint. Once again, it is emphasized that the irresponsible charges directed against Counsel by Petitioner Weissbrodt were totally and completely rejected by the trial court's findings establishing these facts:

> The court notes that the associated attorneys [Petitioner Weissbrodt] fault Mr. Veeder's conduct of the litigation .... This court has presided over the White Mountain case since ... January 25, 1983, with Mr. Veeder as counsel of record during all but 9 1/2 months. For nine years during the litigation ... the court has acquired total familiarity with the legal effort on the Tribe's behalf.[58]

Continuing, the trial court contrasted the work of Respondent Tribe's Counsel with that of Petitioner Weissbrodt. The trial court then, in substance, reiterated the fact that Petitioner Weissbrodt's efforts from the standpoint of benefiting the Tribe were "essentially nil" and were "useless" and stating in reply to Petitioner Weissbrodt's attacks on Counsel that:

> The associated attorneys [Petitioner Weissbrodt] left no fingerprints on the case that was eventually passed on to Mr. Veeder. The 1978 trial record [Petitioner Weissbrodt's] on certain fiscal claims was unusable, and this court tried the Tribe's fiscal claims in full. Mr. Veeder may be difficult and trying to the court's patience, but he has served as an absolutely dedicated advocate on the Tribe's behalf, and the Tribe has been fortunate to have his counsel.[59]

In rejecting the aggressive but futile efforts of Petitioner Weissbrodt to share in the Tribe's $19M monetary award,

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[58] Pet. App. B., p. 22a, n.5.

[59] *Ibid.*

the trial court further exposed as frivolous and false Petitioner Weissbrodt's charges by declaring:

> This award reflects Mr. Veeder's work and does not reflect the work done by the associated attorneys [Petitioner Weissbrodt]. No one is in a better position to pass on the relative capabilities of the associated attorneys [Petitioner Weissbrodt] and Mr. Veeder than this court, whose final task after years of arduous litigation is to assure that justice is done in a case of this magnitude and complexity.[60]

It is to be observed that Petitioner Weissbrodt continued his vicious attacks upon Respondent Tribe's Counsel for approximately half of the Statement and related phases of the Petition. It is believed that it would serve no useful purpose for Counsel to respond to each of the sordid, futile attacks upon him. It is sufficient to say that the trial court, after a decade of litigation involving primarily the destruction of Tribe's Fort Apache Indian Reservation due to the Trustee's "careless administration;"[61] rejected the claims of the United States Trustee to all of the Salt River water arising upon Tribe's reservation; and explicitly declared that the Tribe's title to the reserved Salt River rights had not been taken nor diminished. Similarly, as stated above, it is found as a fact that due to "careless administration," the United States Trustee ". . . must be held liable for the accelerated erosion."[62]

THE GOVERNING PRINCIPLES OF LAW PRECLUDE PETITIONER WEISSBRODT FROM BEING HEARD IN THE COURT AND MANDATE SANCTIONS

Petitioner Weissbrodt Seeks to Present the Central Issue to the Court for the First Time

Petitioner Weissbrodt in the Question Presented[63] seeks to avoid the consequences of the findings of fact, conclu-

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[60] Pet. App. B, p. 22a.

[61] *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 652 (1987).

[62] *Ibid.*

[63] QUESTIONS PRESENTED: Where the "*results obtained*" by an

sions of law, and judgment of the trial court which were affirmed by the Court of Appeals. As reviewed and documented above, Petitioner Weissbrodt contrived a concept that the trial court had found that the value of the rejected settlement was "essentially nil, *per se*" and predicated upon that falsification has requested the Court to review that issue. Most assuredly Petitioner Weissbrodt did not present, brief, or argue that issue in either the trial court or in the Court of Appeals. As a consequence, this Court, by unvarying precedents, has refused to hear issues of that character raised for the first time in the Court.[64] In its *Duignan v. United States* Opinion, the Court stressed that:

> This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

More recently, the Court reiterated those concepts in these terms:

> The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.[65]

It is observed by Respondent Tribe based on the Court's *Duignan* Decision, that the only exceptional issue presented by Petitioner Weissbrodt is his temerity in falsifying an issue and requesting the Court to review it.

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attorney are to be considered in determining the amount of the attorney's court-awarded fee governed by federal law, is it the case that no value is to be placed on obtaining a settlement offer that the client rejected before hiring substitute counsel? The lower courts held that the value of such a settlement offer is "essentially nil" *per se* and is not to be considered in ruling on a fee application. App. at 13a.

[64] 274 U.S. 195, 200 (1927).

[65] *Miree et al., v. DeKalb County, Ga.*, 433 U.S. 25, 33-34 (1977); *See*, also 2 *Federal Procedure, Lawyers Ed.;* Appeal, Certiorari, and Review, Sec. 3.4; 3.8, p. 267, *et seq.*

Respondent Tribe prays this Court to deny the fabricated issue presented to the Court which does not achieve the status of "an afterthought," as observed by the Court in its *Miree* Decision.

Findings that Petitioner Weissbrodt Failed to Sustain His Burden Controlling Here

The documented findings that Petitioner Weissbrodt failed to sustain his burden respecting the work he performed and the client for whom he performed it is a barrier here to recovery.[66]

In its Opinion, the trial court declared, citing the case of *Hensley v. Eckerhart:*

> A fee application is not meant to be a time-consuming trial-type proceeding. . . . Rather, it is a summary proceeding by which the court determines a fee that is reasonable for the work performed.[67]

In *Hensley,* the Court declared that:

> Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. We re-emphasize that the district court has discretion in determining the amount of a fee award.[68]

The Court, moreover, in *Hensley v. Eckerhart,* referred to these principles which are controlling:

> The product of reasonable hours times a reasonable rate does not end the inquiry.[69]

Here, the trial court found as a fact that it was impossible to determine the work that was performed by Petitioner

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[66] *Supra,* p. 5, *et seq.*

[67] Pet. App.B, p. 9a; 30 Fed.Cl. 8, 13 (1993).

[68] *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983).

[69] *Ibid.,* p. 434.

Weissbrodt or for whom. Hence, the court could not find "the product of reasonable hours," the single-most important factor in arriving at a reasonable fee. As a result, Petitioner Weissbrodt's claims were constricted by the trial court. The Court in *Hensley* further declared:

> There remains other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'[70]

In regard to the "results obtained" by Petitioner Weissbrodt, it is essential again to refer to the explicit findings of the trial court. On the background of those unvarying findings that Petitioner Weissbrodt's record in support of his claim is fatally defective, the court very properly added this conclusive finding:

> A rejected settlement . . . cannot reasonably be termed 'a result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.[71]

The court below referenced the decision of *Naporano Iron Metal Co. v. United States.*[72] There it is declared, predicted upon a failure of the claimant involved adequately to support his claim—as found by the trial court in regard to Petitioner Weissbrodt—that:

> Such a showing [lack of itemization in the documents] is inadequate to support an award of attorneys' fees . . . . Much more detail is needed . . . . The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates . . . . In the absence of such an itemized statement, the court is unable to determine whether the hours,

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[70] *Ibid.*

[71] Pet. App. B, p. 13a; 30 Fed.Cl. 8, 14 (1993).

[72] 825 F.2d 403, 404-405 (Fed. Cir. 1987).

> fees and expenses, are reasonable for any individual item.[73]

Failure of Petitioner Weissbrodt even remotely to sustain his legal obligation of establishing the alleged services to the Tribe all as found above, resulted in the Trial court's determination that:

> Justice would be disserved if this court were required administratively to discharge 10-percent of the Tribe's hard-won judgment to the Associated Attorneys based on the showing that has been put forward on their behalf. Since no sum exists that actually inured to the benefit of the Tribe from which a percentage fee can be calculated, compensation is most appropriately awarded using a fixed fee. [$200,000.00].[74]

The Trial Court's Findings As Affirmed Are Binding on Petitioner Weissbrodt

The Court has repeatedly decided that where, as here, Petitioner Weissbrodt seeks to invoke the Court's jurisdiction challenging findings of fact, conclusions of law, and a judgment finally adjudicated by a court of competent jurisdiction, the general rules of *res judicata* are applicable and Petitioner Weissbrodt is bound by them. Petitioner Weissbrodt, predicated on the principles of *res judicata*, is precluded from seeking to relitigate any of the issues that he has attempted to present to the Court in his petition.[75]

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[73] *Ibid.*, p. 404. *See*, also *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327, *et seq.*, (Ca D.C. 1982).

[74] Pet. App. B, p. 23a, 31a; 30 Fed.Cl. 8, 19, 23 (1993).

[75] *Angel v. Bullington*, 330 U.S. 183, 187 (1948). Justice Frankfurter stated: "For purposes of *res judicata*, the significance of what a court says it decides is controlled by the issues that were open for decision." Here, all of the issues properly presented were decided in the trial court and affirmed on appeal; Petitioner Weissbrodt is barred from relitigating any of them. *See*, also *Kramer v. Chemical Construction Corp.*, 456 U.S. 461, 462, 466-467; 469 (1982). In *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1947), the Court states: "The general rule

It was urged to the Court of Appeals that Petitioner Weissbrodt had failed to challenge any of the trial court's findings and hence Petitioner Weissbrodt is bound by those findings. Rule 52a is specific:

> Findings of fact ... shall not be set aside unless clearly erroneous ...

Petitioner Weissbrodt's failure to challenge the trial court's explicit findings resulted in Petitioner Weissbrodt being subjected to those findings predicated on the explicit application of the above mentioned Rule 52a.

In the hallmark decision of *United States v. United States Gypsum Co.*,[76] the Court interpreted and applied Rule 52(a) as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.[77]

Petitioner Weissbrodt, in the Court, as was attempted in the Court of Appeals, seeks to have the Court try the case *de novo* predicated upon his unsupported facts which are reviewed and repeated throughout his petition for certiorari. In total disregard of the trial court's judgment and the findings upon which it is predicated, Petitioner Weissbrodt attacked the trial court's findings and assaulted Respondent Tribe's Counsel, all as reviewed above. That course of erroneous conduct by Petitioner Weissbrodt

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of *res judicata* applies to repetitious suits involving the same cause of action .... The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *See,* 5A *Moore Federal Practice,* Rule 52-12. Effect in Supreme Court of Concurrent Findings of Fact of Two Lower Courts—The Two-Court Rule.

[76] 333 U.S. 364, 394-395 (1948).

[77] *Ibid.*

is precluded by the express language of the Court in *Anderson v. Bessemer City.*[78] There, the Court declared:

> [The clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes [as Petitioner Weissbrodt requests] to duplicate the role of the lower court . . . .[79]

As stressed above, the Court of Appeals affirmed the findings of the trial court and irrespective of that affirmance Petitioner Weissbrodt is, in effect, requesting the Court to set aside both the findings and final judgment of the trial court and to reconsider the falsified issues which Petitioner Weissbrodt has created. Re-emphasizing the impossibility here of obtaining a review of findings of fact affirmed, the Court states in *Bessemer* City:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.[80]

By way of explanation of the all encompassing importance of the "clearly erroneous" concepts, the Court in *Bessemer City* made these further statements:

> The rationale or deference to the original finder of fact [the trial court] is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling

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[78] *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985).

[79] *Ibid.*

[80] *Ibid.*

> that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negatively to the accuracy of fact determination at a huge cost in diversion of judicial resources.[81]

The Court, in *Zenith Radio Corporation* Decision,[82] emphasized that great weight must be accorded to the findings of the trial court by reason of its opportunities to assess the credibility of the witnesses.

It is urged to the Court that it sustain the trial court's findings and judgment predicated upon the unvarying principles enunciated in its *Bessemer* Decision, and the related authorities and reject Petitioner Weissbrodt's request to be heard as being frivolous in the extreme due to the fact that Petitioner Weissbrodt is precluded by the concepts of *res judicata* to relitigate those issues which have been finally adjudicated.

It Is Frivolous for Petitioner Weissbrodt to Request the Court to Review the Affirmed Judgment of the Trial Court

It has been repeatedly emphasized above that Petitioner Weissbrodt in the trial court and on appeal failed to challenge, as clearly erroneous, the explicit findings of the trial court which sharply constricted the fees to be awarded to Petitioner Weissbrodt for his alleged services to Petitioner Tribe. There has been reviewed immediately above the principles enunciated by the Court that litigants are bound by the findings unless those findings are challenged and set aside on appeal as being clearly erroneous. The Court, in its *Southern Railway Co. v. Gadd* Decision declares that where, as here:

> It is manifest on the face of the record that the case was carefully and fully considered in both of the courts below .... we think the conclusion that the writ of

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[81] *Ibid.*, pgs. 574-575.

[82] *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100 (1969).

> error was prosecuted only for delay is plainly justified and that a penalty by way of damages should be imposed. The judgment below is therefore affirmed with five percent upon the amount of the judgment in addition to the interest allowed by law.[83]

The Court of Appeals for the Ninth Circuit in *McConnell v. Critchlow,* considered the criteria for sanctioning frivolous appeals and declared: "This court has discretion to award damages and single or double costs as a sanction against bringing a frivolous appeal," . . . This may include attorneys fees,"[84] citing 28 U.S.C. 1912, which is as follows:

> *Damages and costs on affirmance.* Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

In the last-cited case, the court summarized that the attorney had ". . . failed to exclude from the appeal the judgments favoring the individual defendants although there was no basis for appeal."[85] Here, there was no basis pursuant to which Petitioner Weissbrodt could reasonably seek certiorari and to overcome that deficiency he fabricated the so-called "essentially nil, *per se* rule" and pursued that fabricated issue throughout the entire Petition.

The court of appeals enunciated the concepts applicable here:

> An appeal is considered frivolous in this circuit when the result is obvious . . . or the appellant's arguments of error are wholly without merit.

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[83] 233 U.S. 572, 581 (1914).

[84] 661 F.2d 116, 118 (1981).

[85] *Ibid.*

> Pursuit of a meritless claim [of the character here involved] is not justified by the client's desire to do so.[86]

Where an attorney failed to exercise due diligence, as mandated by the rules of court, the Court of Appeals for the Second Circuit declared:

> Given the feebleness of Beane's proffer of 'due diligence . . .' it was well within the district court's discretion to reject the explanations and to consider the 'evidence' not newly discovered.[87]

From that district court ruling, an appeal was taken. The appellate court declared that the appeal was:

> . . . entirely frivolous—a quality plainly shared by the motion itself—and we are constrained to note that it follows close on the basis of *Potamkin's* direct appeal . . . which we also found to be 'utterly without legal merit,' and frivolous within the meaning of . . . [the Rules of Federal Practice].[88]

In a well-reasoned decision, the Court of Appeals for the Ninth Circuit considered the issues before it on appeal and declared:

> Appellate has essentially attempted to retry factual issues in the appellate forum. This appeal is frivolous. We think it was pursued for purposes of delay . . . 28 U.S.C. 1912, expressly vests us with discretion to impose sanctions upon those who prosecute frivolous appeals . . . . In view of the superfluity of the issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the

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[86] *Ibid.* p. 119.

[87] *United States of America v. Potamkin Cadillac Corp.*, 697 F.2d 491, 492, 493, 494, (CA 2, 1983); cert. den. it is stated that: "The Chief Justice, Justice Rehnquist, and Justice O'Connor would award Respondent damages pursuant to this Court's Rule 49.2, 462 U.S. 1144 (1983).

[88] *Ibid.*, p. 494.

> abundant evidence [as here] supporting the determination [below], we exercise our discretion .... Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken.[89]

In *Action Manufacturing Inc. v. Fairhaven Textile Corp.*, the Court of Appeals for the First Circuit stated:

> For defendants to pursue this matter on appeal is not merely frivolous, it is an imposition on appellee and the court. For such a severe disregard of counsel's duty it is appropriate to charge counsel personally with attorney's fees as part of appellee's costs."[90]

It has similarly been stated, citing 28 U.S.C. 1912, that:

> Appellate courts have the undisputed power to sanction a party who brings a frivolous appeal .... An appeal is considered frivolous when its disposition is 'obvious,' and the legal arguments are 'wholly without merit' ....[91]

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[89] *United States ... v. Santa Fe Engineering Inc.*, 567 F.2d 860, 861 (CA 9, 1978).

[90] 790 F.2d 164, 166 (CA 1, 1986).

[91] *Reliance Insurance Co. v. Sweeney*, 792 F.2d 1137, 1138 (Ca A, D.C. 1986). *See*, also 67 ALR Fed. 1319, *et al.*, Sanctions for frivolous appeals; see also supplement 67 ALR Fed. Issued October 19, 1993.

CONCLUSION

It is respectfully urged to the Court that Respondent Tribe has been subjected to a frivolous and vexatious proceeding by Petitioner Weissbrodt which is totally without merit.

WHEREFORE, RESPONDENT WHITE MOUNTAIN APACHE TRIBE, RESPECTFULLY PRAYS THIS COURT to deny the petition for writ of certiorari and to assess costs, fees, damages, and interest as appropriate sanctions for Petitioner Weissbrodt's grave misconduct.

Respectfully submitted,

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for
White Mountain Apache Tribe
of Arizona, Respondents

Dated: September 9, 1994

No. 94-210

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,
Petitioner,
v.
THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA and THE UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Petitioner Israel S. Weissbrodt

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York
MICHAEL D. LIEDER
Washington, D.C.

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IN THE

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REPLY BRIEF FOR THE PETITIONER

Respondent does not take issue with the merits of our Petition.[1] Respondent does not rebut our demonstration that the question we have tendered is an issue of broad importance, applicable to a wide variety of cases in which the federal courts are called upon to evaluate the "results obtained" by counsel in ruling on fee applications. Pet. 12-17. Respondent does not dispute in any way our showing that what we say the holding below is—that a settlement offer once rejected is not a valuable "result obtained"—conflicts with the holdings of a variety of federal and state courts. Pet. 17; Br. in Opp. 16. Respondent does not take issue with the accuracy of our quotation of many decisions of the courts below in this case

[1] The United States is technically a respondent, *see* S. Ct. R. 12.4, but it did not participate in the proceedings below and has waived its right to submit a Response to the Petition. Therefore, we shall use the term "Respondent" to refer solely to the White Mountain Apache Tribe of Arizona.

critical of the voracious and wasteful consumption of judicial resources following the rejection of the settlement. Pet. 6-8.[2] And Respondent does not dispute the importance of fair rules that promote the settlement of civil litigation, or that the rule advocated by the Petition would be such a rule. Pet. 12, 18.

Instead, Respondent takes issue with our characterization of this case as an ideal one in which to establish and announce these rules, principally by arguing (a) that the trial court did not adopt a *per se* rule that a rejected settlement is not to be considered as a "result accomplished" and (b) that in any event the facts of the case are not as bad as they seem. Respondent is wrong on each score.

1. *The Lower Court Announced a Per Se Rule.*—Respondent is in agreement with us that the touchstone of what the Court of Federal Claims decided, and what the Court of Appeals affirmed, is to be found in the passage from the lower court's opinion which appears as the first paragraph on page 13a of our Appendix. In an effort to claim that the court did not enunciate a *per se* rule,[3] the Respondent quotes from that paragraph twice (Br. in Opp. 4, 12).

The thesis of that paragraph is as follows:

> A rejected settlement, no matter how attractive it appears with hindsight, cannot reasonably be termed a "result accomplished" that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys for the Tribe was essentially nil. The true "result accomplished and the benefit[] flowing to the client[]" was the final award. The associated attor-

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[2] Respondent does misquote our Petition, however, claiming that we said all of that wasteful litigation would have been *"permitted"* by a settlement. Br. in Opp. 15 (emphasis by Respondent). We said that the wasteful litigation would have been *"pretermitted."* Pet. 19. There is a difference.

[3] The Respondent thus calls our "question presented" a "falsified" question presented. *See, e.g.*, Br. in Opp. 11-13, 16, 20.

> neys [Weissbrodt] are entitled to compensation only to the extent that their efforts contributed to achieving this award. (Pet. App. 13a.)

Respondent says that this is not the expression of a *per se* rule but a "finding of fact." It seems to us obvious that it is the expression of a *per se* rule.

No more than a reading of the passage is really necessary to make this plain. But the rest of the court's opinion confirms it by applying the *per se* rule it enunciates: since the rejected settlement is not a "result accomplished," the court goes on a chimerical search to see the extent to which Weissbrodt's efforts, which ceased in 1982 on his termination, contributed to a judgment entered ten years later.

As the quoted material says, Petitioner and his associates were under the court's rule "entitled to compensation only to the extent that their efforts contributed to achieving" "the final award." The court repeated that the criterion was "the degree to which the associated attorneys' work assisted in obtaining the final judgment" (Pet. App. 18a), and held that it was inappropriate to base the attorney-fee award on the final award to the Tribe because the final award "does not reflect the work done by the associated attorneys." (Pet. App. 22a.)

2. *Respondent's Protests Notwithstanding, the Facts Are As Bad As They Seem.*—Respondent then spends much effort attempting to prove that this was *not* a case of a client lured into litigation to the bitter end and winding up with a worse outcome than the settlement offer it rejected. Standing in the way of this attempt is the remarkable prescience displayed by Weissbrodt, who told the Tribe it would take ten years to achieve a like amount to the $13 million settlement offer, Pet. 4, and the claims of tens and ultimately hundreds of millions of additional dollars that replacement counsel said he could obtain but failed to deliver. To get around these hard facts, Respondent returns to two of the three concerns raised in connection with the Tribe's 1982 rejection of the $13 million settlement. *See* Pet. 4-6.

First, it insists that the concerns about the settlement's effect on its future water rights were not only well-founded but also borne out, because, it says, the Federal Court of Claims actually granted it some kind of declaratory relief in connection with future water rights that would have been lost through the proposed settlement. Br. in Opp. 8-9. That is simply false.

Leaving aside the recommendation of the Government's trial counsel that the final text of the settlement agreement contain an express disclaimer of any effect on the Tribe's water rights (Pet. 4)—a fact that Respondent does not and cannot deny [4]—review of a few elementary principles is sufficient to dispose of the notion that this litigation (let alone a settlement of it) could have had any effect on any of the Tribe's water rights. The jurisdiction of all four tribunals that adjudicated this matter at the trial level—the Indian Claims Commission, the Court of Claims, the Claims Court, and the Court of Federal Claims—was limited to the award of money damages.[5]

A passage by the trial court alluded to and quoted out of context by Respondent (Br. in Opp. 8-9) confirms this to be the case. The court "found and concluded that

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[4] Contrary to what Respondent says, the proposal at the time of the settlement was not simply to proceed on the basis of an informal interpretation by the Government's trial counsel (Br. in Opp. 2-3), but to pursue trial counsel's recommendation that an express disclaimer of any effect on the water rights issue be included in the settlement agreement.

[5] *Osage Nation of Indians* v. *United States,* 1 Ind. Cl. Comm. 54, 65-66 (1948), *rev'd on other grounds,* 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied,* 342 U.S. 896 (1951); *Kingsbury* v. *United States,* 215 Ct. Cl. 136, 563 F.2d 1019, 1023-24 (1977) ("This court does not have jurisdiction of a claim *in rem* or of claims generally for specific relief. *United States* v. *Jones,* 131 U.S. 1 (1889). Congress has consented to suits *in rem* against the United States only in courts other than this one. . . . 43 U.S.C. § 666 (water rights)"). Decisions of the Court of Claims are binding on the Federal Circuit, and thus on the Court of Federal Claims and its predecessor, the Claims Court. *South Corp.* v. *United States,* 690 F.2d 1368, 1370 (Fed. Cir. 1982) (in banc).

plaintiff proved no damages" or liability for any claim of governmental diversion or mismanagement of water rights. 11 Cl. Ct. 614, 647. As for the assertion that the court was actually providing some kind of declaratory relief about the priority of the Tribe's water rights (Br. in Opp. 8-9), the court expressly cautioned that "this is not a *Winters* Doctrine rights case insofar as the Claims Court lacks jurisdiction to adjudicate claims over plaintiff's reserved water rights in terms of the right to future use. That question is being litigated in Arizona state court." 11 Cl. Ct. at 626-27.

Thus, the proper forum for the adjudication of Respondent's future water rights was not, and could never have been, any of the tribunals to which this case has been assigned over the decades. They had no jurisdiction; and apart from that, as forums for claims against the United States, they could not adjudicate the relative rights of the many private parties who might assert conflicting water rights claims, as in a state court proceeding. *See, e.g., Martin* v. *Wilks*, 490 U.S. 755, 763 (1989). Respondent knows this. The Ninth Circuit's decision in *White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921 (9th Cir.), *cert. denied*, 479 U.S. 1006 (1986), was one in a long series of Respondent's efforts under its present counsel to thwart the adjudication of those claims in the proper forum. The Court had this to say:

> As it has on numerous occasions in the past, the Tribe here again sought a ruling that Arizona courts had no jurisdiction to adjudicate the Tribe's water rights . . . . The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it. We find it difficult to respond to the Tribe's contentions at this late date other than to state flatly that the Tribe is wrong. The state court *does* have the authority to adjudicate tribal water rights. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. § 666; the United States Supreme Court has said so, *see Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); the

> Arizona Supreme Court has said so, *see United States* v. *Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985); and we have said so, *see Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187 (9th Cir. 1983). It is time that the Tribe accept the proposition as true.

Id., 784 F.2d at 924 (emphasis by the court). The Ninth Circuit therefore concluded that insofar as any charges of mismanagement "affect the amount of water to which the Tribe is entitled, they must be presented to the Superior Court of Maricopa County." *Id.*

Thus, the Arizona state courts—and not any of the tribunals in this case—were vested with jurisdiction over the Tribe's water-rights claims. No declaratory judgment could have been or was made on such claims by the Court of Federal Claims. 11 Cl. Ct. at 626. And the proposed settlement did not affect them; it is black letter law that a judgment cannot operate as *res judicata* on a claim as to which the court had no subject matter jurisdiction.[6] While theoretically a release clause in the settlement agreement could have, if it expressly purported to, release claims beyond the scope of the court's subject matter jurisdiction, the fact of the matter is that the release clauses in the proposed settlement agreement here only covered claims which the Tribe "have asserted or could have asserted" in the docket "under the Indian Claims Commission Act." *See* Court of Appeals Appen-

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[6] "When special jurisdictional limitations prevent assertion of all matters arising out of a single transaction in one action, a second action is not precluded." 18 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 4412 at 94 (1981); *see Lower Sioux Indian Community* v. *United States*, 224 Ct. Cl. 458, 626 F.2d 828, 831-32 (Ct. Cl. 1980) (judgments not preclusive where they were issued under statutes granting specific limited jurisdiction to the Court of Claims to adjudicate only certain claims: the "claims plaintiffs now wish to present were not part of any claim of which this Court had jurisdiction" under the special acts); *cf. Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1071 (Fed. Cir. 1994) (takings claim in Court of Federal Claims not barred by district court action where Tucker Act precluded claims litigation in the district court), *cert. filed*, 63 U.S.L.W. 3066 (July 18, 1994).

dix at 79-81; Pet. 5 n.7. Thus, the arguments that the settlement was properly rejected because of a concern about water rights—or that water rights were somehow secured by the subsequent decade of litigation—or that the $13 million settlement and the judgment obtained a decade later cannot be compared because the $13 million settlement would have sacrified the water rights—are all without merit.[7]

Second, Respondent asserts that the actual amount it recovered was somehow better than the rejected settlement (Br. in Opp. 7-8, 14, 17). This, too, is without substance. Respondent does not and cannot dispute that replacement counsel gave the Tribe visions of tens and ultimately *hundreds* of millions of dollars that were not delivered. The truth is that, because of purchasing-power differences, the $13 million settlement would have been superior from a financial, as well as a resource-allocation, point of view. We pointed out that the judgment Respondent obtained after ten years of litigation—for about $14.4 million, which with interest totalled some $19 million [8] in November 1993, when the trial court denied the fee application at issue here—was worth less in constant dollars than the $13 million settlement. Pet. 9 & n.14. Like the Court of Federal Claims,[9] Respondent seems to

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[7] Respondent's other argument that it obtained something more than money involves a repeatedly rejected theory about the Reservation's boundary. Br. in Opp. 10, 14. Whatever the merit of the claim (it was again rejected in the decade of subsequent litigation as it has been by several other courts), the lower courts' jurisdiction here was limited to an award of money damages. *See supra* pp. 4-5.

[8] The Respondent claims that the Petition compared the rejected $13 million settlement of 1982 with the $14.4 million judgment of 1992 without interest. (Br. in Opp. 7.) But our comparison of the real value of the two settlements uses the $19 million figure, including the interest, for what the additional decade of litigation got *in toto*. *See* Pet. 9 & n.14 (the current value of the rejected settlement at the time of the hearing on the fee application was $21.8 million).

[9] *See* Pet. App. 20a ("the comparison [of $13 million adjusted for the time-value of money with the $14.4 million adjusted for

think it appropriate to treat the $13 million rejected settlement as though it would have been handed over in a sheaf of currency to be stuffed into a mattress or locked away in a drawer for ten years, rather than to be used.

In the end, Respondent is left only with the third concern that drove rejection of the settlement—a desire to "know[] what its claims were worth" by litigating to the bitter end. *See* Pet. 6; Br. in Opp. 9-10. To be sure, a lawyer's client has, and must have, the right to choose such a course of action; we do not suggest otherwise. We merely suggest that exercise of that right should be conditioned on facing obligations under rules designed to promote fairness, judicial efficiency, and just resolution of civil litigation. *See* Pet. 16-17, 18.

3. *Respondent's Procedural Arguments Are No Bar to Review.*—Respondent makes two procedural arguments. *First*, it actually asserts that this Court is *bound* by the lower courts' decisions in this case under the doctrine of "res judicata." Brief in Opp. 2, 5, 17, 23-26. A lower court decision has no *res judicata* effect on direct appeal. Apparently Respondent's argument is an effort to invoke the rule that factual findings of a trial court will not be disturbed on appeal unless clearly erroneous. Of course, that rule has no application to questions of law, like the one presented here: whether a settlement offer rejected by a client is of no value in considering the "results obtained" in connection with a fee application. And, as demonstrated above (pp. 2-3) that issue was decided as a question of law. *See* Pet. App. 13a. As Professor Moore has explained, "Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, if there is

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the time-value of money] is invalid since it assumes that the Tribe would have banked all the proceeds"). Once again, our methodology in comparing the settlement and the final judgment (the latter with interest, the former without) does not assume that the $13 million settlement would have been invested at interest; it assumes rather that it would have been immediately spent. It still would have bought more goods and services than the final judgment, with its interest, would have bought.

error as to the law." 5A J. William Moore, *et al.*, *Moore's Federal Practice* ¶ 52.03[3] at pp. 52-79 to 52-81 (2d ed. 1994). Thus, this Court has vacated and remanded a fee award for redetermination by the trial court where the lower court "did not properly consider the relationship between the extent of success and the amount of the fee award." *Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983).

In this regard, Respondent's insistence (Br. in Opp. 5-7) that the trial court's decision rested on whether Weissbrodt met his "burden of proof" is misguided. To be sure, the authority to determine the proper fee in this case is vested in the trial court (as is the case with all court-supervised fee awards). But whether the trial court applied the proper standard in doing so is a question of law. And the only question of law presented in the Petition is whether the lower courts were correct in enunciating a rule that assigned a value of "essentially nil" to a rejected settlement proposal; we expressly disclaimed reliance in seeking certiorari on the trial court's other apparent errors (Pet. 11 n.18). These other errors were committed in the course of the court's exploration of the factual inquiry that necessarily resulted from the court's core error, that Weissbrodt and his associates were "entitled to compensation only to the extent that their efforts contributed to achieving this award," that is, "the final award," obtained after the successor counsel's decade of litigation, in 1992. *See* pp. 2-3, *supra*; Pet. App. 13a. The "burden of proof" that was thus imposed on Weissbrodt as a result of the court's error is what the Respondent speaks of in contending that Weissbrodt did not meet his "burden of proof" (Br. in Opp. 5-7). What Weissbrodt unquestionably produced was the $13 million settlement, rejected by the Tribe in 1982.

Second, in an apparent flight of fancy, Respondent contends that the question presented in the Petition was not raised in the lower courts. Br. in Opp. 5, 11. But Petitioner's entitlement to an award of 10% of the rejected settlement has been the central question throughout

the proceedings. Point II of Weissbrodt's brief in the Court of Appeals was that "The lower court erred in treating the value of the proposed settlement as nil because the Tribe elected to reject it." Brief of Appellant 20. The passage begins, "The Court of Federal Claims . . . refused to accord any value at all to the negotiated settlement. . . . The court was wrong, as a matter of logic and policy," *id.* at 20-21, and goes on for five pages. The additional point, that the settlement offer was a valuable "result achieved," consumes pages 30 to 34. The issue also received attention at the Court of Federal Claims level; indeed, as noted above (p. 2), Respondent quotes from that court's *holding* on this point of law not once but twice. Br. in Opp. 4, 12. Any contention that it was not *the central* issue below—not simply *an* issue raised below—is frivolous. The issue was raised below; the central ruling below is clearly one of law; and that ruling is not defended on its merits, nor is the importance of the question denied.

CONCLUSION

For the foregoing reasons, and the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700
KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Petitioner
Israel S. Weissbrodt

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York
MICHAEL D. LIEDER
Washington, D.C.
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Supplemental Brief Of Respondent White Mountain Apache Tribe In Opposition To Petitioner Weissbrodt's Reply Brief

SUPPLEMENTAL BRIEF

WILLIAM H. VEEDER
Counsel of Record
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for Respondent White Mountain Apache Tribe of Arizona

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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PETITIONER WEISSBRODT'S DISSIPATION "OF SCARCE JUDICIAL RESOURCES"

A. Reply Brief Seeks to Present for First Time Issues of Law

Respondent White Mountain Apache Tribe, acting in conformity with Court's Rule 15, documented the false and fabricated facts and the distortions of the law presented to the Court by Mr. Weissbrodt's Petition, with particular references to the "Question Presented."[1] Tribe stressed throughout its Response that the trial court's unchallenged findings of facts, which were affirmed on appeal predicated upon the precepts of *res judicata,* constitute a complete barrier to the Petition submitted to the Court by Mr. Weissbrodt.[2] Respondent Tribe attempted with diligence to

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[1] Response In Opposition, pgs. 1-07; 11, *et seq.*

[2] *Ibid.*, pgs. 5, *et seq;* pgs. 23, *et seq.*

comply with the Court's mandate that it should address "any perceived misstatements of fact or law"[3] set forth in Petitioner Weissbrodt's filing with the Court. What Respondent Tribe did not anticipate was that Petitioner Weissbrodt would, in his Reply Brief, contend that the finding "essentially nil" is a question of law necessitating this Supplemental Brief Rule 15.7. In this brief, Respondent Tribe will seek to avoid the needless waste of the Court's . . . scarce judicial resources. . . ."[4]

B. Petitioner Weissbrodt Attempts in Error to Convert a Finding of Fact Into a "Question of Law"

Respondent Tribe condemns as grossly unprofessional Petitioner Weissbrodt's pronouncement that "the central ruling below is clearly one of the law." That "afterthought" in the Petitioner's Reply Brief should not be considered by the Court as held in its *Miree Decision*.[5] When the Petitioner was confronted with principles of *res judicata,* which established beyond question that he cannot sustain his burden of proof respecting the legal services which he performed, or for whom those services were performed, or the amount of the fees due and owing to him,[6] it became expedient for him to undertake another fabrication in his desperate effort to mislead the Court. Petitioner Weissbrodt's attempts to convert an explicit, affirmed finding of fact into a question of law and to petition the Court to hear that false question.

C. Futility of Mr. Weissbrodt's Petition for Writ of Certiorari; It Should Be Denied

Assuming arguendo only that the Weissbrodt Petition has some merit, which is denied, Mr. Weissbrodt's claim

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[3] The Court's decision of *Oklahoma City v. Tuttle,* 471 U.S. 808, 815-816 (1985), is the genesis of Court's Rule 15. In *Oklahoma City,* the Court emphasized that "[o]ur decision to grant certiorari represents *a commitment of scarce judicial resources* . . . ." *See,* "The Supreme Court's New Rules for the 90s" 128 F.R.D. 295, 313-314.

[4] *Oklahoma City v. Tuttle,* 471 U.S. 808, p. 815-816, (1985).

[5] Reply Brief, p. 10; See Response in Opposition, p. 20, *et seq.*.

[6] Response in Opposition, p. 5, *et seq.*, p. 21 *et seq.*

is fatally flawed beyond correction. As established by the record, Petitioner Weissbrodt, while purporting to represent Respondent Tribe, spent thirty (30) do-nothing years.[7] As a consequence the trial court found, and the finding was affirmed on appeal, that Petitioner Weissbrodt did not maintain records (1) "... as to the nature of the work ..." he allegedly performed for Respondent Tribe;[8] and (2) that Petitioner Weissbrodt failed to maintain records as to "... the client for whom the work was done."[9] As a consequence, Petitioner Weissbrodt failed to sustain his burden of proof.[10] Respecting Petitioner Weissbrodt's failure to sustain his burden of proof respecting the work he allegedly performed, the trial court found that:

> ... it is difficult to assess what, if any, work performed by ... [Petitioner Weissbrodt] ... contributed to the final judgment for the Tribe.[11]

The trial court stressed that in all other cases that it reviewed "... the petitioning attorneys made a substantial, quantifiable, and easily identifiable contribution to their client's recovery."[12] Continuing, the trial court found that "[i]n contrast, the services rendered and the results obtained by ... [Petitioner Weissbrodt] ... in this case are insufficiently established to justify using a contingent fee calculation."[13]

Unable to respond to the uncontroverted facts that Petitioner Weissbrodt was found by the trial court to have failed to sustain his burden of proving the work he performed for the Tribe and the fees to which he was entitled, Petitioner Weissbrodt in his Reply Brief can make only

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[7] Response in Opposition, p. 13, *et seq.*

[8] Response in Opposition, p. 5, *et seq.*

[9] *Ibid.*

[10] Response in Opposition, p. 5, *et seq*, 21 *et seq.*

[11] Pet. App. B, p. 24; 30 Fed. 8, 19 (1993).

[12] *Ibid.*

[13] *Ibid.* (Emphasis supplied).

this vacuous answer to the trial court's findings and the Tribe's charges:

> . . . Respondent's insistence . . . that the trial court's decision rested on whether Weissbrodt met his 'burden of proof' is misguided.[14]

It is urged to the Court that should it grant to Mr. Weissbrodt his Petition for a Writ of Certiorari, it would be an act of total futility for the reason that the trial court has already declared that Petitioner Weissbrodt has failed to sustain his burden of proof,[15] as a consequence of which he cannot possibly recover the fees that he is seeking. That would be a prime example of a total waste of the Court's . . . scarce judicial resources."

Respondent Tribe did not anticipate that Petitioner Weissbrodt would wait until he filed his Reply Brief to present for the first time to the Court that the "essentially nil *per se* rule,"—which he seeks to have reviewed—is an issue of law.

Attempting to avoid the consequences of his failure to sustain his burden of proving the work that he did or for whom, Mr. Weissbrodt for the first time makes these references to the fact that he desires the Court to consider that the central issue that he seeks to have reviewed is:

> . . . whether the trial court applied the proper standard [as to Petitioner Weissbrodt's burden of proof] in doing so is a question of law. And the only question of law presented in the Petition is whether the lower courts were correct in enunciating a rule that assigned a value of 'essentially nil' to a rejected settlement proposal. . . .[16]

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[14] Reply Brief, p. 9.

[15] *Supra.*, p. 3.

[16] Reply Brief, p. 9; Response in Opposition, p. 19, *et seq.* "Failure of Petitioner Weissbrodt to Sustain His Burden of Proof"; p. 21, "Findings that Petitioner Weissbrodt Failed to Sustain His Burden Controlling Here."

D. The Trial Court's Findings Affirmed on Appeal Are Not Issues of Law

Failure of Petitioner Weissbrodt to consider the trial court's findings, which were affirmed on appeal, has resulted in Petitioner Weissbrodt stripping from context the words "essentially nil" from the balance of the finding and to declare it an issue of law. This is the precise language that was used, which was totally ignored by Petitioner Weissbrodt, both in his petition for certiorari and in his Reply Brief:

> A rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by . . . [Petitioner] for the Tribe was essentially nil.[17]

Irrespective of the fact that the quoted language is explicit, Petitioner Weissbrodt continues to strip from the finding the term "essentially nil" and has attempted to pervert that phase of the finding into a question of law, an approach by Petitioner Weissbrodt that was never previously advanced in his petition for certiorari.

Petitioner Weissbrodt was fully cognizant from the finding of the trial court that his rejected settlement had to be considered on the background of what, if any, benefits accrued to Respondent Tribe from the rejected settlement as it pertained to Respondent Tribe's final judgment. Predicated upon the record before it, the trial court found as an explicit fact that "[t]he result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil." Continuing, the trial court then declared that Petitioner Weissbrodt is ". . . entitled to compensation only to the extent that their [his] efforts contributed to achieving this award"[18]—the Tribe's final judgment.

Respondent Tribe reiterates its repeated assertions that the Findings of Fact and Conclusions of Law reviewed in

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[17] Response in Opposition, p. 11, *et seq.*

[18] Pet. App. B, p. 13a, 30 Fed.Cl. 8, 14 (1993).

its Brief in Opposition are conclusive in all respects and the precepts of *res judicata* preclude Petitioner Weissbrodt from attempting to relitigate them.[19]

It is plain and serious error for Petitioner Weissbrodt to assert that the "burden of proof" that was ". . . imposed on Weissbrodt" was attributed to the trial court's alleged error in finding that ". . . the result obtained by . . . [Petitioner Weissbrodt] . . . for the Tribe was essentially nil."[20] That last-quoted finding has absolutely no relationship to the trial court's other findings that the data submitted to the trial court by Petitioner Weissbrodt for alleged services were grossly inadequate ". . . due to lack of specificity, regarding the nature of the work [that Petitioner Weissbrodt allegedly performed] and the client for whom the work was done."[21] An abundance of unvarying precedents mandate that Petitioner Weissbrodt had the burden of proving the services he rendered, for whom, and the reasonable value of those services.[22] Petitioner Weissbrodt failed to sustain that burden. As stressed above, for the Court to grant certiorari to Petitioner Weissbrodt under the circumstances would be an act of futility.

FAILURE OF PETITIONER WEISSBRODT TO COMPREHEND THE IMMENSE VALUE OF THE TRIAL COURT'S AFFIRMANCE OF TRIBE'S RESERVED *WINTERS* DOCTRINE RIGHTS

Failure of Petitioner Weissbrodt to comprehend the most elemental principles of Western Water Law was a factor in Tribe's decision to terminate his employment. That lack of comprehension is abundantly manifest in the failure of Petitioner Weissbrodt to comprehend the import of the trial court's declaration that the United States Trustee had

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[19] Response in Opposition, p. 19-26.

[20] Reply Brief, p. 9.

[21] Response in Opposition, p. 5, *et seq.*

[22] *Ibid.*, p. 5, *et seq.*, p. 21, *et seq.*

neither taken nor diminished Tribe's reserved Salt River rights irrespective of the repeated contentions of agents of the Trustee that Tribe's reserved rights had been taken and committed to the Secretarial Salt River Federation Reclamation Project.[23]

The sole and only issue before the trial court respecting Tribe's Salt River rights was whether those rights had been taken or diminished by the United States in constructing the downstream Salt River Federal Reclamation Project. At issue before the trial court was the question of whether the United States by inverse condemnation under the Fifth Amendment had taken Tribe's reserved Salt River rights which are interests in real property of the highest dignity.[24] Had there been a Fifth Amendment "taking," the Tribe was entitled to full compensation for the value of its rights. The trial court had the full power, jurisdiction and authority to declare, as it did, that there had not been a Fifth Amendment taking of Tribe's reserved rights or that title to those rights had been subordinated to the rights of the non-Indian Salt River Federal Reclamation Project.[25]

A clear demonstration of Petitioner Weissbrodt's lack of comprehension respecting Tribe's reserved rights to the use of water is his ridiculous statement:

> Thus, the proper forum for the adjudication of Respondent's future water rights was not, and could never have been, any of the tribunals to which this case has been assigned over the decades. They had no jurisdiction. . . .[26]

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[23] Response in Opposition, p. 7-11.

[24] *Wiel, Water Rights in the Western States*, 3rd Ed. Vol. 1, Sec. 18, p. 20-21; Sec. 283, p. 298-300. *See, United States v. Dickenson*, 331 U.S. 745-748 (1947); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Ashwander v. TVA*, 297 U.S. 288, 330 1936).

[25] Response in Opposition, p. 7-9.

[26] Reply Brief, p. 5.

To suggest—as does Petitioner Weissbrodt—that the McCarran Amendment[27] is relevant to the proceedings before the trial court[28] is a further demonstration of his lack of elemental knowledge on the subject. Petitioner Weissbrodt failed to comprehend the import and meaning of the trial court's decision that Respondent Tribe's reserved *Winters* Doctrine Salt River rights have ". . . priority over the rights asserted by the later-created" Secretarial Salt River Federal Reclamation Project.[29]

Petitioner Weissbrodt's Flagrant Misstatements Must Be Controverted

Petitioner Weissbrodt presents these consummate falsehoods in the opening sentences of his Reply Brief: "Respondent does not take issue with the merits of our Petition."[30] Additionally, and contrary to fact, Petitioner Weissbrodt falsely states that Respondent does not rebut the question tendered or challenge the "showing" that a rejected settlement is not a valuable "result obtained." Those statements, grossly contrary to fact, transcend the acceptable precepts of advocacy and because they drastically depart from the truth, they are grossly unprofessional. The Court is requested to reject them.

Respondent Tribe, in its Brief in Opposition, exposed the fraud in Petitioner Weissbrodt's "Question Presented" and established beyond controversy that the Question Presented and Petitioner Weissbrodt's interpretation of the question were never presented to the courts below. That charge is reiterated here with documentation.[31]

Petitioner Weissbrodt, in his Reply Brief, seeking to establish that the "Question Presented" was considered below, sets forth this quotation from his brief in the Court

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[27] 43 U.S.C. 666.

[28] Response in Opposition, p. 7-9.

[29] Response in Opposition, p. 8-9.

[30] Reply Brief, p. 1.

[31] Response in Opposition, p. 19, *et seq.*

of Appeals: " 'The lower court erred in treating the value of the proposed settlement as nil because the Tribe elected to reject it.' "[32] It is manifest from that quoted excerpt from the brief on appeal that Petitioner Weissbrodt, both here and on appeal, perverted the language of the trial court's finding which is as follows:

> The rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.[33]

The Court is urged to compare the language of the trial court's last-quoted finding with the "Question Presented" here by Petitioner Weissbrodt, and likewise compare that finding with the quotation set forth above taken from Petitioner Weissbrodt's Brief in the Court of Appeals.

It is abundantly manifest that the "Question Presented" here by Petitioner Weissbrodt is drastically different from the quotation in Petitioner Weissbrodt's Reply Brief taken from his brief in the Court of Appeals.[34] It is likewise abundantly manifest that neither Petitioner Weissbrodt's statement to the Court of Appeals nor his question presented to the Court even remotely relate to the trial court's finding.

Petitioner Weissbrodt's attempted perversion of the trial court's finding is an effort to create a question of law and thus mislead the court should result in the denial of his petition for a writ of certiorari.

CONCLUSION

In presenting this Supplemental Brief, Respondent White Mountain Apache Tribe seeks to be of service to the Court by demonstrating that Petitioner Weissbrodt could never

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[32] Reply Brief, p. 10.

[33] Pet. App. B, p. 13a.

[34] Reply Brief, p. 10.

obtain recovery against the Tribe over and above the award that was made to him by the trial court. That fact appertains due to Petitioner Weissbrodt's failure to challenge the trial court's findings that he did not offer proof as to the services he allegedly rendered to Respondent Tribe or indeed offer proof as to the client for whom the alleged services were performed. Under those circumstances, as emphasized throughout this Supplemental Brief, Petitioner Weissbrodt is not entitled to invoke this Court's jurisdiction to review the falsified question that he has presented.

WHEREFORE, RESPONDENT TRIBE renews its request for relief as set forth in its Brief in Opposition.

Respectfully submitted,

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for White Mountain Apache Tribe of Arizona, Respondent

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